

PRAGMATISM AND FREEDOM OF SPEECH

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I. INTRODUCTION

Over the past twenty years or so, pragmatism¹ in one form or another² has experienced a remarkably broad resurgence,³ if not a literal renaissance.⁴ Pragmatists of various sorts have of late flourished in the study⁵ and practice⁶ of the law.

The prominence of pragmatism should encourage reflection on what pragmatism is likely to actually deliver and to not deliver, in practice, over the long term. Pragmatism in some minimal sense surely engages our sympathies. Pragmatism in a minimal sense of caring about what actually

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1. While no single definition of pragmatism can encompass all the writers discussed below, we can say that much contemporary philosophical pragmatism involves skepticism or indifference toward traditional "ambitious" concepts of metaphysics or reality, knowledge, truth, and objectivity. See *infra* Parts III, IV. Moral objectivity, in turn, has been very simply and very preliminarily defined in terms of the idea that "[i]t is possible to find out about some moral sentences that they are true." Judith Jarvis Thomson, *Moral Objectivity*, in MORAL RELATIVISM AND MORAL OBJECTIVITY 65, 68 (Gilbert Harman & Judith Jarvis Thomson, eds., 1996). See, e.g., Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33 (1995) (discussing legal objectivity).

2. Use of the word "pragmatism" may encompass narrowly technical philosophy as well as less strictly philosophical approaches. See Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism For the Twenty-First Century*, U. ILL. L. REV. 163, 164-69 (1995) (leading example of less strict philosophical approach).

3. See generally Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996); Louis Menand, *The Return of Pragmatism*, 48 AM. HERITAGE 48, 48 (Oct. 1997) (stating "The Philosophy of Pragmatism . . . is making a comeback as the twentieth century draws to a close").

4. See generally Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); see also Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747, 1747 (1990) (stating "[t]he renaissance of pragmatism in philosophy, literary criticism and legal thought in the past few years is a salutary development").

5. See generally *infra* Part IV. Professor Christopher Kutz, in the course of reviewing a pragmatically themed book by legal philosopher and tort theorist Jules Coleman, reports that his "recent Westlaw search turned up nearly 200 law journal articles with 'pragmatic' or 'pragmatism' in the title . . ." Christopher Kutz, *Pragmatism Regained*, 100 MICH. L. REV. 1639, 1642 (2002). A similar search some months later resulted in a total of 231 citations. Search by present author on Westlaw (JLR database) for the title (pragmati!), conducted October 16, 2002.

6. The best known contemporary judicial exponent of some form of pragmatism is Judge Richard Posner of the Seventh Circuit Court of Appeals. See *infra* Part IV.

“works,” about real payoffs, and making decisions with an eye toward context and circumstance seems somehow reassuringly commonsensical and easily justifiable. Pragmatism in a more philosophical sense attempts to somehow deemphasize or entirely set aside some traditionally important philosophical questions, as we will see particularly in Part III. This article will focus on some of the most sophisticated and influential versions of contemporary pragmatism.⁷ It will consider what these forms of pragmatism would eventually come to mean if they were consistently applied in the important realm of free speech jurisprudence.⁸ The conclusions as to the practical meaning of pragmatism for freedom of speech will reflect some conclusions about the nature and effects of pragmatism more broadly.⁹ Focusing on the important area of freedom of speech will illustrate and provide clarification of broader conclusions as to the more general effects of pragmatism.

By way of conclusion, this article will disagree with those who believe that pragmatism actually leaves everything substantively the same and is thus ultimately without any systematic normative impact. We should equally disagree, however, with those who see pragmatism as a generally progressive long-term influence on law and culture. This paper concludes instead that pragmatism neither leaves jurisprudence as it was nor qualifies as systematically progressive.¹⁰ I will argue for these conclusions argued for both in general terms¹¹ and, crucially, with specific reference to freedom of speech.¹² I shall argue that pragmatism does create important decisional indeterminacies.¹³ But pragmatism’s indeterminacies do not mean that pragmatism leaves law and ethics substantively as they are. Nor does pragmatism even of the most sophisticated sort tend over the long term to have systematically progressive or otherwise attractive consequences.¹⁴

Pragmatist doctrines ultimately tend to drain the life from our most adequate and circumstantially appropriate moral vocabularies and cannot properly account for virtually all of the classic free speech values, aims, and purposes. Pragmatism in free speech adjudication ultimately leads to a normatively flattened free speech law. In such a flattened landscape,

7. There are a number of contemporary pragmatist theorists, and we shall refer to several in passing, but our primary focus will be on the sophisticated philosophical pragmatism developed prolifically over time by Professor Richard Rorty. *See infra* Parts III-IV.

8. *See infra* Part IV.

9. *See infra* Parts III-IV.

10. *See id.*

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part IV.B.

14. *See infra* Parts III.B. and IV.B.

progressive constitutional arguments are not easier to make than formerly. In fact, they are harder to make. Pragmatism leads to a gradual loss of dimension and meaning in free speech adjudication, regardless of case outcomes or the perceived stakes on either side of the case.¹⁵

These arguments will be developed along the following lines. First, I will briefly examine several centrally important claims made by classic American philosophical pragmatism.¹⁶ This background is for the sake of a better understanding of contemporary philosophical pragmatism, especially the work of Richard Rorty.¹⁷ Attention is paid to pragmatism and problems of realism, truth, objectivity, and what is called philosophical "foundationalism."¹⁸ I will consider whether Rortyan pragmatism leaves accounts of vital experiences and of moral and legal issues substantively undisturbed or even undistorted.¹⁹

I then focus more narrowly on pragmatism in the law and in the free speech context particularly.²⁰ I offer some examples of pragmatism in the free speech context.²¹ I address the implications of Rorty's work,²² but with attention as well to the work of Judge Richard Posner.²³ The discussion of Rorty and Posner on free speech focuses on some of the values and goals commonly thought to crucially underlie the scope and limits of freedom of speech.²⁴ In the free speech context, philosophical pragmatism tends first to display indeterminacy, and then ultimately to drain much of the real significance from free speech adjudication.²⁵ I conclude with a brief look at a recent free speech case²⁶ viewed with the lenses of Rortyan and Posnerian pragmatism, before providing a final reminder of some of our most crucial concerns.²⁷

15. *See infra* Part IV.

16. *See infra* Part II.

17. *See infra* Parts III.A. and IV.

18. *See infra* Part III.A.

19. *See infra* Part III.B.

20. *See infra* Part IV.

21. *See id.*

22. *See infra* Part IV.A.

23. *See infra* Part IV.B and text accompanying notes 190-218.

24. *See infra* Part IV.A and text accompanying notes 124-33.

25. *See infra* Parts IV.A. and IV.B.

26. *See infra* text accompanying notes 200-18.

27. *See infra* text accompanying notes 219-20.

II. AMERICAN PHILOSOPHICAL PRAGMATISM: SOME CLASSIC PROPOSITIONS

Various forms of pragmatism have been prominent in American philosophical and legal²⁸ writing. Famously,²⁹ Charles Sanders Peirce argued that "[t]he opinion which is fated to be ultimately agreed to by all who investigate is what we mean by truth and the object represented by this opinion is the real."³⁰ The point of this claim, which otherwise might well be acceptable to various non-pragmatists,³¹ is to provoke a reassessment of our ordinary understanding of seeking truth and discovering the real.³² There is no truth and no reality independent of our collective investigations and unanimous opinions. And there can be no truth and no reality where there will be no ultimate agreement.

According to Peirce, to hold something to be true is merely to hold the opinion, on whatever grounds, that the belief in question will eventually be accepted, on whatever grounds, by all investigators.³³ The truth or falsity inquiry thus unstably shifts to the opinions of others, which themselves may in mirror-like fashion be focused largely on other persons' opinions. In particular, if pragmatism itself is true, this truth consists simply in the fact that pragmatism will eventually be unanimously thus adopted.

Who counts as an "investigator" and how long (given the rise and decline of cultures) counts as "ultimate" on this pragmatist model present questions of detail. What counts as the same or a different opinion, and whether we have all agreed on something present, however, a serious problem of infinite regress. Presumably, "we" must unanimously agree on just what unanimous agreement itself involves, if there is to be any truth of the matter. But whether "we" have unanimously genuinely agreed even on this may be unclear. What sort of unanimous agreement would be required? That question would itself require unanimous agreement of a further

28. We shall set aside what might be called American legal pragmatism, both old and new, for consideration below. See *infra* Part IV.

29. Colin McGinn, Book Review: *Charles Sanders Peirce: A Life*, THE NEW REPUBLIC June 28, 1993, at 27.

30. CHARLES S. PEIRCE, HOW TO MAKE OUR IDEAS CLEAR, PHILOSOPHICAL WRITINGS OF PEIRCE 38 (Justus Buchler ed., Dover 1955) (1878). See CHRISTOPHER HOOKWAY, TRUTH, RATIONALITY, AND PRAGMATISM: THEMES FROM PEIRCE (2000) (commenting on Peirce).

31. Compare Peirce's formulation with the observation of the non-pragmatist John Stuart Mill: "As mankind improve [*sic*], the number of doctrines which are no longer disputed or doubted will be constantly on the increase; and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested." JOHN STUART MILL, ON LIBERTY 106 (Penguin ed., 1982) (1859).

32. McGinn, *supra* note 29, at 27.

33. Peirce, *supra* note 30, at 38.

unspecified sort.³⁴ But how would we know when we arrived at that further agreement? Hence the infinite regress problem for Peirce's formulation.

However, Peirce's formulation is only one possible statement of American philosophical pragmatism. Other candidates are available. Consider, for example, the following from John Dewey:

Instead of impossible attempts to transcend experience,³⁵ we have the significant record of the efforts of [persons] to formulate the things of experience to which they are most deeply and passionately attached. Instead of impersonal and purely speculative endeavors to contemplate as remote beholders the nature of absolute things-in-themselves, we have a living picture of the choice of thoughtful [persons] about what they would have life to be, and to what ends they would have [persons] shape their intelligent activities.³⁶

Present here is synecdoche³⁷ and metonymy.³⁸ Dewey's argument unfortunately addresses only an extremist who, unlike even Immanuel Kant himself,³⁹ believes that we can behold "the nature of absolute things-in-themselves. . . ."⁴⁰ Thus, Dewey opposes pragmatism not to metaphysics, or to a concern for ultimate reality⁴¹ in any standard sense, but merely to a particularly implausible metaphysical ambition rejected even by the non-pragmatist Kant. Pragmatism cannot convincingly establish itself by undermining only the most extreme forms of rival views.

34. This regress could be stopped only by the non-pragmatic or at least non-Peircean decision that the truth or falsity of claims about whether unanimous agreement exists, or about how to define such a unanimous agreement, can be resolved on grounds at least partially independent of the idea of unanimous agreement. Note also that the regress problem does not crucially hinge on Peirce's claim that the agreement in question must be somehow completely unanimous.

35. See GEORGE STEINER, *REAL PRESENCES* 3-4 (Univ. Chi. Press 1989) (contrasting argument that art and communication more generally must somehow bet on or seek the transcendent).

36. JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 25-26 (rev. ed., 1948).

37. See WEBSTER'S UNABRIDGED DICTIONARY 1851 (2d ed. 1983) (defining synecdoche as taking the part for the whole).

38. *Id.* at 1134 (defining metonymy as taking something associated with a thing to stand for that thing).

39. See, e.g., Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351, 401 (2001); Fred R. Dallmayr, *Borders or Horizons? Gadamer and Habermas Revisited*, 76 CHI.-KENT L. REV. 825, 826 (2002); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 474 n.77 (1994).

40. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 302 (J.M.D. Meiklejohn trans. 1900) (1787).

41. See *infra* Part III.A (referencing the meanings of metaphysics and of truth).

Notable as well is Dewey's reference to things that a pragmatist could be "most deeply" attached.⁴² One must not casually assume that a consistent pragmatist could continue to use the word "deep" in all of the standard senses. The range of meanings of some rhetorically powerful words may ultimately and inevitably be narrowed where the pragmatist rejects the metaphysics,⁴³ or the ambitious assumptions as to what can be real, that are inseparable from standard meanings of the word in question. This will make an important difference when the pragmatist is confronted by the horrific or the ennobling.

To clarify this point, consider the use of the term "deeply," as in "I am deeply offended," by a pragmatist or even a moral skeptic. It is certainly possible for even a moral skeptic to be deeply offended by something in some senses. The idea of "depth" in such a case might include the mere degree or duration of sheer pain the moral skeptic endures, as long as the pain is not dependent upon any (deeper) metaphysical beliefs, including any metaphysical beliefs about personal dignity. Perhaps the pragmatist or moral skeptic could use the idea of "deep offense" merely to report the unexpectedness of the challenge, and to warn against or discourage further challenge. Or perhaps the challenged preference is linked to many other preferences or beliefs, some general and others more specific, held by the pragmatist or the skeptic. Certainly a pragmatist could associate a preference with a long-held, or strong, but non-metaphysically-tainted emotion,⁴⁴ and hold a preference "deeply" in this sense.

One could certainly add to this list of ways in which pragmatists or moral skeptics could hold themselves to be "deeply" offended by something. The crucial mistake to avoid is to imagine that all of the traditional and valued possible meanings of "deep offense" remain available to the pragmatist. They do not. To the extent that a pragmatist abandons metaphysics, some of the standard meanings of "depth" of offense and of being "deeply" offended, and their associated rhetorical power, are no longer logically available to the pragmatist.

42. DEWEY, *supra* note 36, at 25.

43. See, e.g., *infra* Part III.A and ALAN MALACHOWSKI, RICHARD RORTY 43 (2002) (explaining the idea of abandoning or perhaps somehow merely distrusting metaphysics).

44. Some emotions seem to ordinarily involve some sorts of (deeply) metaphysical belief, as in the case of the emotion associated with reverence for some entity one thinks to be divine. Other emotions seem to have much more limited metaphysical commitments, as when one fears an assault not for its implications for one's dignity, but for the prospect of sheer physical pain. See, e.g., MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001); ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (1993); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); RICHARD WOLLHEIM, ON THE EMOTIONS (1999) (discussing the philosophy of emotions).

For example, to a pragmatist who has abandoned metaphysics, nothing can be deeply offensive because it violates human dignity or the sanctity of the person in the most standard and powerful senses. Such a pragmatist may want to protest the underlying event on many grounds, and with whatever emotional vehemence is deemed pragmatically best. But such a pragmatist must either redefine and de-metaphysicalize the terminology of dignity and sanctity in such a case, or else grant that the violation of human dignity cannot, for the pragmatist, be meaningful or morally offensive, deeply or otherwise, in the metaphysically-laden senses. If pragmatists really abandon metaphysics, they must then abandon any terminology that bears metaphysical meaning or else re-define the language involved in ways independent of metaphysics. This is a matter of transparency, candor, and socially communicative logic. This logic applies against even a pragmatist who thinks that watered-down versions of truth, reality, dignity, and sanctity are the only kinds that make sense, or who decides what to say about truth, reality, dignity, and sanctity on "pragmatic" grounds.

Thus far we have seen that among the earlier American pragmatists there is at least a distrust of, or a disinclination to pursue, questions of metaphysics. This tendency is allied to a complementary, more affirmative emphasis on what "works" and on what "pays off," as in the pragmatism of William James. James minimizes the search for objective truth⁴⁵ in favor of truth as a marriage of older and newer experiences conducive to overall satisfactoriness.⁴⁶ Any non-pragmatic truth that exists independently of this marriage or that is otherwise arrived at can be only "the dead heart of the living tree."⁴⁷

For William James, "ideas . . . become true just in so far as they help us get into satisfactory relations with other parts of our experience."⁴⁸ More elaborately, the "test of probable truth is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experiences' demands, nothing being omitted."⁴⁹

This sort of pragmatism raises a number of questions. First, for James, an idea could tend to be true as enhancing our relations with some parts of our experience. But the same idea could tend to be false as somehow impairing the satisfactoriness of our relations with other parts of our

45. WILLIAM JAMES, PRAGMATISM 31 (Prometheus ed., 1991) (1907). We shall simply assume that there are no pragmatically or otherwise meaningful distinctions between "probable truth" and truth itself. See *infra* text accompanying note 48.

46. JAMES, *supra* note 45, at 31.

47. *Id.*

48. *Id.* at 58.

49. *Id.* at 44.

experience. The question naturally arises as to which of these two realms of our experience is more important than the other. But this question will likely not have a straightforward pragmatist answer. Which areas of our experience are somehow more important must be answered only by seeing which possible answers to this further question themselves fit in most satisfactorily with all affected areas of human experience. Here, pragmatism involves not so much an infinite regress, as a crucial failure to gain any traction.

Second, it seems possible that allowing us perhaps one falsehood, in the more traditional sense, might best and most satisfactorily unite broad bodies of experience. Would such a traditionally conceived falsehood then earn the status of pragmatic truth? If we are to pass judgment on, say, the truth or falsity of some basic religious belief, which bodies of whose experience are relevant? Are both the consolations⁵⁰ and all the monumental and the petty cruelties of religion relevant to its truth or falsity? Does a belief become pragmatically truer as it becomes more emotionally comforting to more persons in more areas of their lives? Is this the way we want (pragmatic) truth and falsity to operate?

More broadly, how can all the parts of life and experiences be weighed and sorted?⁵¹ The basic problem is not one of omitting some aspect of experience⁵² but of properly classifying and measuring them all on "satisfactory" pragmatic standards. Does one aim at satisfactoriness in the sense of somehow maximizing consistency, fit, or interconnectedness among all our beliefs? Or could satisfactoriness also consist in part in fertility in generating new compatible beliefs? Is happiness a part of our life? A part of a part? Is happiness an experience? Is satisfactoriness in the sense of consistency among our beliefs particularly likely to produce satisfactoriness in the sense of happiness?⁵³ Does humanity expect the most thoroughly logical persons to in this respect be the happiest? Is the satisfactoriness of the relations among all our experiences a subjective matter, an objective matter, or sometimes one or the other? Don't we usually think of an ideologue or a fanatic as someone whose beliefs and values are unusually consistent and mutually reinforcing, whether their belief system overall is true or grossly wrong?

50. See, e.g., SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* (James Strachey trans., 1961) (1975 ed.) (1927); KARL MARX, *CONTRIBUTION TO THE CRITIQUE OF HEGEL'S PHILOSOPHY OF RIGHT IN KARL MARX: EARLY WRITINGS* 41-46 (Thomas B. Bottomore trans. 1963) (1843).

51. See sources cited *supra* note 50.

52. See *supra* text accompanying note 48.

53. Of course, happiness in various senses may depend on many things other than our pursuing or happening upon the truth.

One may also wonder whether we are to take the “parts”⁵⁴ of our lives as merely given. Surely any serious approach to truth, pragmatist or otherwise, must sometimes ask us to abandon some of our practices and ideas. When considering the abandonment of some ideas and the adoption of others, should one think mostly about the sheer number of new harmonious relationships within the resulting belief system, including new harmonies between old ideas? How does one pragmatically address the prospect of revising one’s pragmatized identity? And how does one decide the truth of our beliefs on precisely this matter without setting up yet another infinite regress—or another tractionless wallow?

More vividly, what if we eventually come to find the universe to be an unwelcoming, inherently meaningless, ultimately doomed place, in a way that is permanently unsatisfactory for us? Has such a truth then really “paid off” or “worked” for us? Has the truth in James’ sense led us well⁵⁵ in such a case? Moreover, how do we know which practices and ideas lead us well or work best for us without some independent idea of what is valuable or true? Why shouldn’t we just calculatedly lead ourselves to more stably consoling and eventually sincerely held beliefs merely by associating more with persons and groups who already hold such consoling beliefs?

It may be tempting to say that it is better, or more in keeping with human dignity, to live maturely by an unpleasant, demoralizing truth than by a somehow reassuring but false belief. But this would amount to a non-pragmatic understanding of truth and falsity. For the pragmatist, no view is true or false until we see its overall payoff. No doubt there are limits to our ability to delude ourselves with pleasant thoughts. Acting as though each of us individually were an absolute political ruler will usually not pay off for us in a pragmatic sense. But there is still plenty of room on the pragmatic account for a deluded belief that pays off over the long term. With future advances in radical genetic engineering, pharmacology, brain stimulation, and the technology of virtual reality, the general character of what pays off for us pragmatically may dramatically change.

However, focusing on the logical difficulties of James’ pragmatism ignores what we might call the psychological or rhetorical difficulties. It is psychologically difficult even for the pragmatist to adhere to pragmatist principles, and even more difficult to avoid reliance on non-pragmatist resonances and associations in our talk. Consider the example of James’ rejection, on rather dubiously pragmatist grounds,⁵⁶ of the traditional ideas

54. See generally, MICHAEL ARGYLE, *THE PSYCHOLOGY OF HAPPINESS* (2d ed. 2002).

55. *Id.*

56. JAMES, *supra* note 45, at 53.

of free will and moral responsibility.⁵⁷ In this connection, James asks “whether any man, woman or child, with a sense for realities, ought not to be ashamed to plead such principles as either dignity or imputability.”⁵⁸

No doubt James can refer to “realities” or to how someone ought to be “ashamed” to invoke the ideas of moral responsibility, blameworthiness, or imputability while at the same time rejecting the traditional idea of being ashamed. But to one degree or another, the persuasive force of pragmatism here is improperly borrowed. James cannot consistently give up certain ideas while retaining their overtones of meaning and their associations, at least if he wishes to present what an unconvinced audience will take to be a sound and unobjectionable overall argument. This is not to accuse James of bad faith. The rich associations of our traditional moral and philosophical vocabulary, however, cannot be readily set aside by pragmatist speakers or their listeners. James is in such cases inevitably relying on traditional meanings and resonances that his pragmatist redefinitions must repudiate. If we give up dignity, we must give up much of the meaning of shame as well. At the levels of both logic and psychology, then, James’ pragmatism leaves us with disturbing implications.

III. RICHARD RORTY’S CONTEMPORARY PRAGMATISM AND THE DEPTH OF LIVED EXPERIENCE

A. RORTY AND THE PRAGMATIC CULTURE

Among contemporary American pragmatists, probably the most widely discussed⁵⁹ is Richard Rorty.⁶⁰ Rorty builds upon the work of earlier

57. *Id.*

58. *Id.* at 45-46. See *infra* notes 142-51 and accompanying text (referencing some contemporary discussions of the free will problem).

59. See, e.g., RORTY AND HIS CRITICS (Robert B. Brandom ed., 2000). See also David Luban, *What’s Pragmatic About Legal Pragmatism?*, in THE REVIVAL OF PRAGMATISM 275, 278 (Morris Dickstein ed., 1998) (referring to “post-philosophical pragmatism, of which Richard Rorty is the most distinguished exemplar”); H.O. MOUNCE, THE TWO PRAGMATISMS: FROM PEIRCE TO RORTY (1997).

60. This is not to suggest that contemporary American pragmatism focuses exclusively on Rorty’s work. See RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983) (providing a sense of the broader inquiry); NICHOLAS RESCHER, REALISTIC PRAGMATISM: AN INTRODUCTION TO PRAGMATIC PHILOSOPHY 192 (1990) (stating “[f]rom this standpoint, utilitarianism is straightforwardly tantamount to one particular version of moral pragmatism”); JOSEPH MARGOLIS, PRAGMATISM WITHOUT FOUNDATIONS: RECONCILING REALISM AND RELATIVISM (1986) (providing a sense of the broader inquiry); Henry S. Richardson, *Beyond Good and Right: Toward a Constructive Ethical Pragmatism*, 24 PHIL. & PUB. AFF. 108, 113 (1995) (stating “the agent is to deliberate about what she ought to do in a way that is open both to revising principles of right in terms of the good or ill that would result from following them and to revising the conception of the good on the basis of insights about what would be right or wrong to do”); Paul Boghossian, *The Gospel of Relaxation: Review*

American pragmatists by disclaiming any interest in questions of metaphysics and reality,⁶¹ of truth⁶² and falsity in any traditional sense, of knowledge,⁶³ and “foundationalist”⁶⁴ approaches to knowledge in

of Louis Menand, *The Metaphysical Club*, THE NEW REPUBLIC, Sept. 10, 2001, at 35 (providing a sense of the broader inquiry).

61. See 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 21, 22 (1991) (stating “those who wish to reduce objectivity to solidarity—call them ‘pragmatist’—do not require either a metaphysics or an epistemology. They view truth as, in William James’ phrase, what is good for us to believe”) (emphasis in the original). See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn For the Worse?*, 41 STAN. L. REV. 871, 893 (1989) (discussing who counts as part of “us”). See, e.g., David Papineau, *Realism and Epistemology*, 94 MIND 367 (1985) (discussing contemporary approach to realism as a doctrine); WILLIAM P. ALSTON, A REALIST CONCEPTION OF TRUTH (1996) (same).

62. See 1 RORTY, *supra* note 61, at 21-24. “[R]ealists’ have to construe truth as correspondence to reality. So they must construct a metaphysics which has room for a special relation between beliefs and objects which will differentiate true from false beliefs.” *Id.* at 22. See also 3 RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 1, 11 (1998) (arguing “against the theory that true beliefs or statements correspond to the intrinsic nature of reality, and also against the view that we now need a new theory of truth to replace this correspondence theory”). See Moore, *supra* note 61, at 893; see also Uwe Steinhoff, *Truth vs. Rorty*, 47 PHIL. Q. 358 (1997) (discussing the differences between the truth of a belief and its justifiedness). See Philip Kitcher, *On the Explanatory Role of Correspondence Truth*, available at http://www.columbia.edu/~psk16/correspondence_truth.htm (last visited May 31, 2004) (discussing just one example of an exposition of the classical correspondence theory of truth). See Eugene Wigner, *The Unreasonable Effectiveness of Mathematics in the Natural Sciences*, 13 COMM. IN PURE & APPLIED MATH 1, 9 (1960) (concluding that “mathematical language has more to commend it than being the only language we can speak; . . . it is, in a very real sense, the correct language”).

63. See 1 RORTY, *supra* note 61, at 24 (stating “[a]n inquiry into the nature of knowledge can, on [the pragmatist’s] view, only be a sociohistorical account of how various people have tried to reach agreement on what to believe”). See also Moore, *supra* note 61, at 893.

64. 1 RORTY, *supra* note 61, at 24. Rorty embraces a form of “coherentism,” as opposed to “foundationalism,” while denying that his often highly contextualized or localized coherentism is another highly general theory of knowledge or truth. 3 RORTY, *supra* note 62, at 171. See also Paul D. Forster, *Pragmatism, Relativism and the Critique of Philosophy*, 29 METAPHILOSOPHY 58 (1998). Foundationalism, as rejected by Rorty, involves a combination of basic premises that may be considered self-evident or otherwise indubitable, along with other beliefs inferable from or otherwise dependent upon those basic premises. *Id.* at 171-72. That one could reject foundationalism while still being committed to ambitious positions on basic questions of metaphysics and knowledge is under-recognized by Rorty. *Id.* at 172. See, e.g., William P. Alston, *Two Types of Foundationalism*, 73 J. PHIL. 165 (1976) (discussing the foundationalist versus broad coherentist debate); Robert Audi, *Foundationalism, Coherentism, and Epistemological Dogmatism*, 2 PHIL. PERSP. 407 (1988) (same); Michael R. DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96 MIND 463 (1973) (same); Nicholas Rescher, *Foundationalism, Coherentism and the Idea of Cognitive Systematization*, 71 J. PHIL. 695, 703 (1974) (stating “the foundationalist approach to justification does not represent the only way of implementing the justificatory process inherent in the approach to knowledge as true, justified belief”); Joseph Margolis, *Skepticism, Foundationalism, and Pragmatism*, 14 AM. PHIL. Q. 119 (1977); ALVIN PLANTINGA, WARRANT AND PROPER FUNCTION (Oxford Univ. Press 1993). Interestingly, some leading contemporary theologians have sought to pursue theology on a non-foundationalist basis. See, e.g., Alvin Plantinga, *Is Belief in God Properly Basic?*, 15 NOUS 41 (1981) (proper basicity as not involving foundationalism); Nicholas Wolterstorff, *Can Belief in God be Rational If It Has No Foundation?*, in PHILOSOPHY OF RELIGION 109 (Melville Y. Stewart ed., 1996); STANLEY J. GRENZ & JOHN R. FRANKE, BEYOND FOUNDATIONALISM 43-44 (2001) (discussing coherence theories); JOHN E. THIEL, NON-FOUNDATIONALISM 58 (1994) (discussing holistic or non-foundationalist theologies); THEOLOGY WITHOUT FOUNDATIONS (Stanley Hauerwas, Nancey Murphy & Mark

particular, and of "objectivity"⁶⁵ in all of the above contexts. This lack of interest in objectivity and the like does not make Rorty into a traditional sort of relativist.⁶⁶ To embrace relativism in a standard sense would on Rorty's view be self-refuting and still too philosophically ambitious.⁶⁷ Saying that every viewpoint, including pragmatism and non-pragmatism, is "really" as good as any other viewpoint would hardly allow one to be much of a pragmatist. Nor does a pragmatist have to rank all cultures as equally useful even for those directly affected.

In particular, Rorty's rejection of any aspiration to objective truth includes any search for objective moral truth. Morality cannot transcend the conversation of any particular community, even though any community can proclaim the superiority of its own perspective over those of all other communities. The resulting disputes among moral communities cannot be neutrally or objectively resolved by good philosophy.⁶⁸ There are no objective moral truths written in the heavens, no "moral facts out there in the world,"⁶⁹ no "truths independent of language,"⁷⁰ and no "neutral ground on which to stand and argue that either torture or kindness are preferable."⁷¹

While Rorty seeks to avoid claims that purport to be objectively true or false, he is willing to deny—although presumably merely pragmatically and non-objectively—"that we possess a deep, hidden, metaphysically significant nature which makes us 'irreducibly' different from inkwells or

Nation eds., 1994); J. WENTZEL VAN HUYSSTEEN, *ESSAYS IN POST-FOUNDATIONALIST THEOLOGY* (1997).

65. 1 RORTY, *supra* note 61, at 24. The search for objectivity is assumed by Rorty to involve an ultimately fruitless or unhelpful search for an historical supra-contextual truth independent of perspective. See generally *id.* For Rorty, abandoning the quest for objectivity leads us ultimately to the conclusion that "we must, in practice, privilege our own group, even though there can be no noncircular justification for doing so." *Id.* at 29.

66. See *id.* at 202.

67. See *id.* (stating "[t]o accuse postmodernism of relativism is to try to put a meta-narrative in the postmodernist's mouth"). RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* 166 (1982).

68. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 173 (Cambridge Univ. Press 1989).

69. *Id.* But see David Backhurst, *Pragmatism and Moral Knowledge*, 24 CAN. J. PHIL. 227, 227 (Cheryl J. Misak ed., Supp. Vol. 1998)

In the last twenty years there has been a dramatic revival of interest in the idea that there can be genuine moral knowledge It is now common to hear the claim that moral values are genuine constituents of the furniture of the world—or at least of its upholstery—and that moral deliberation and judgment legitimately aspire to truth.

Id.

70. RORTY, *supra* note 68, at 173.

71. *Id.* It has been argued, even more dramatically, that "adopting the moral point of view need not involve belief" and may on some series of suppositions nevertheless have pragmatic value as a "bluff." See, e.g., Richard Joyce, *The Fugitive Thought*, 34 J. VALUE INQUIRY 463, 472, 476-77 (2000).

atoms.”⁷² Rorty’s unwillingness to draw any metaphysical difference between persons and inkwells correctly suggests that he does not put much stock in traditional ambitious understandings of the self or of personhood.⁷³

On the basis of these minimal selves, we somehow choose to identify with one or more overlapping or conflicting communities.⁷⁴ Of course, if we could choose our communities “pragmatically,” that would require that we already have some sense of what is pragmatically effective for us and what is not, which would itself have to stem from our already identifying with one community rather than another. It is thus not easy to get the pragmatic project gracefully off the ground. Neither reason in general,⁷⁵ nor moral reason in particular,⁷⁶ allows us to transcend the shared sentiments of our somehow chosen communities in any objective way. Rorty observes that “[w]e pragmatists argue from the fact that the emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories, to the conclusion that there is probably no knowledge of the sort Plato envisioned.”⁷⁷ Whether this conclusion itself aspires to objectivity or to merely pragmatic truth we shall leave unresolved.

Decisive, then, are our various community or cultural identifications and the possible conflicts among such identifications.⁷⁸ We may each think of our community identifications in various ways, even where such identifications do not obviously conflict. Rorty himself, for example, refers to his own identifications in various ways. Rorty refers broadly to “we

72. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 373 (1979).

73. See 1 RORTY, *supra* note 61, at 185 n.24 (stating “[i]t may be helpful, for purposes of systematizing our intuitions about the priority of liberty, to treat the self as having no center, no essence, but *merely* as a concatenation of beliefs and desires”) (emphasis in the original).

74. *Id.* at 200-01.

75. See *id.* at 187 n.33 (expressing distrust of any assumed distinction between “mere preference” and “less arbitrary” grounds for decision as well as for any clear distinctions among reason, will, and emotion). See Richard Rorty, *Universality and Truth*, in RORTY AND HIS CRITICS *supra* note 59, at 8 (stating “I cannot see much difference between the bigot’s reaction to me and Habermas and Habermas’ and my reactions to him. I cannot see that anything like ‘communicative reason’ favors our reactions rather than his. This is because I do not . . . see why the term ‘reason’ is not as much up for grabs as the term ‘academic freedom’ or ‘morality’”).

76. 1 RORTY, *supra* note 61, at 200 (stating “[m]orality is . . . a matter of ‘we-intentions’”).

77. 3 RORTY, *supra* note 62, at 172. Whether those who would resist the culture of human rights are equally capable of telling equally affecting sad and sentimental or otherwise motivating stories, or of desensitizing us to the sad and sentimental stories of their opponents, is worthy of reflection. It is certainly possible that some poets may grow tired of obliging Rortyan pragmatists by endlessly apotheosizing merely pragmatic Rortyan values with no deeper justification. See Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner’s and Rorty’s Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 143-44 (1996).

78. 1 RORTY, *supra* note 61, at 176-77.

wealthy, secure, educated inhabitants of the First World.”⁷⁹ Alternatively, Rorty identifies with “the community of the liberal intellectuals of the secular modern West”⁸⁰ and as well with “us postmodernist bourgeois liberals.”⁸¹

On this basis, Rorty aspires to “a utopian, inclusivist, human⁸² community—one which prides itself on the different sorts of people it welcomes, rather than on the firmness with which it keeps strangers out.”⁸³ Social progress consists not in our increasing reasonableness or in gradually approaching nearer to any truth, but in coming “to see more and more differences among people as morally irrelevant.”⁸⁴ Specifically, the aim is “to see the difference between people’s religions, nations, genders, races, economic status, and so on as irrelevant to the possibility of cooperating with them for mutual benefit and as irrelevant to the need to alleviate their suffering.”⁸⁵ Otherwise put, Rorty seeks “a maximally free, leisured, and tolerant global community,”⁸⁶ marked by “toleration, free inquiry, and the quest for undistorted communication.”⁸⁷

However, Rorty specifies that the value of tolerance should be understood as not merely compatible with policies such as, for example, “banning pornography”⁸⁸ but, more crucially, with distinguishing “the sort of individual conscience we respect from the sort we condemn as fanatical.”⁸⁹ Distinguishing the fanatical from the non-fanatical,⁹⁰ or our

79. 3 RORTY, *supra* note 62, at 7. See also JEAN BETHKE ELSHTAIN, DON’T BE CRUEL: REFLECTIONS ON RORTYAN LIBERALISM 139, 152 (Charles Guignon & David R. Hiley eds. 2003) (contrasting the power of non-metaphysical and metaphysically-based opposition to institutionalized cruelty).

80. 1 RORTY, *supra* note 61, at 29.

81. *Id.* at 199.

82. The extent to which one’s chosen communities embrace non-human animals, or nature in general, is in itself presumably not entirely a matter of merely the boundaries of community membership.

83. RORTY, *supra* note 75, at 1.

84. 3 RORTY, *supra* note 62, at 11.

85. *Id.* at 11-12. The crucial problem with pragmatism here is not that pragmatists cannot get any critical distance from some important elements of the dominant economic culture, but the limitations on the ultimate force, persuasiveness, or rational appeal of non-objectivist pragmatic arguments. See CHRISTOPHER NORRIS, TRUTH MATTERS 114-16 (2002) (discussing this crucial problem).

86. Richard Rorty, *The Decline of Redemptive Truth and the Rise of Literary Culture*, available at <http://www.stanford.edu/~rrorty/decline.htm> (last visited May 31, 2004).

87. 1 RORTY, *supra* note 61, at 29. Why we would, in a pragmatic culture, particularly want to emphasize “inquiry” in the first place is not entirely clear.

88. Richard Rorty, *What Can You Expect from Anti-Foundationalist Philosophers? A Reply to Lynn Baker*, 78 VA. L. REV. 719, 725 (1992).

89. 1 RORTY, *supra* note 61, at 176.

90. *Id.*

heroes from our enemies,⁹¹ will of course involve no aspiration to objectivity or to any community-transcending truth.⁹² Instead, such crucial judgments are made at the level of the communities with which one already identifies, largely through exchange of anecdote, in a “relatively local and ethnocentric ‘fashion.’”⁹³

Thus toleration,⁹⁴ or tolerance⁹⁵ and free inquiry,⁹⁶ are at various points joined with denunciations of what we choose to call fanaticism, as well as to what Rorty refers to as the “diabolizing”⁹⁷ of our constructed local enemies. Specifically, “we liberals cannot tolerate enemies of tolerance beyond a certain point. Our mutual respect does not, and should not, extend to anti-Semitic hate speech.”⁹⁸

It must be emphasized that Rorty’s views on the scope and limits of freedom of speech and of tolerance do not involve any attempt to seek out any objectively sound set of principles, with the inquiry naturally beginning in our own culture. Rorty cannot take this sort of metaphysically ambitious step.⁹⁹ Rorty’s preferences regarding speech and tolerance instead flow,

91. *Id.* at 200.

92. *Id.* at 176.

93. *See id.* at 176-77 (stating “what counts as rational or as fanatical is relative to the group to which we think it necessary to justify ourselves—to the body of shared belief that determines the reference of the word ‘we’”). *Id.* at 201 (discussing the importance of “convention and anecdote” in this context).

94. *See supra* note 88 and accompanying text.

95. *See supra* note 87 and accompanying text.

96. *See supra* note 88 and accompanying text.

97. 1 RORTY, *supra* note 61, at 200 (noting moral ethos of a culture as formed not so much through philosophy as through the arts, which modify the group self-image through, *inter alia*, “apotheosizing its heroes” and “diabolizing its enemies”).

98. Richard Rorty, Book Review, *The Trouble with Principle*, 82 NEW LEADER 15 (Dec. 13, 1999). *See also* JEFFREY STOUT, *ETHICS AFTER BABEL* 231 (1988) (interpreting Rorty as implicitly saying “[t]olerate the superstitious, but only if they agree to hold their fanatical tendencies in check”).

99. *See, e.g.,* SUSAN HAACK, *EVIDENCE AND INQUIRY: TOWARDS RECONSTRUCTION IN EPISTEMOLOGY* 184 (1993) (according to Rorty, “[j]ustification is not only a social, but also an entirely conventional, matter: it makes no sense to suppose that our practices of criticizing and defending beliefs could be grounded in anything external to those practices”); William G. Weaver, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729, 755 (1992) (noting that for the pragmatist, “[t]here is nothing like reality or injustice or nature for a proposition to cut into, except insofar as those notions exist as other propositions in our language”); John Patrick Diggins, *From Pragmatism to Natural Law, Walter Lippman’s Quest for the Foundations of Legitimacy*, 19 POL. THEORY 519, 536 (1991) (stating “since indeed philosophy as representation has ‘ended,’ philosophy must, Rorty contends, take the ‘linguistic turn’ and continue as language and conversation, an exercise not in what we know but in how we speak, write, and engage in other discursive practices”); Lynn A. Baker, “Just Do It”: *Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697, 703 (1992) (noting “Rorty’s claim that his premise simply embodies ‘ungroundable desires’ for which there is ‘no noncircular theoretical backup’ is an example of pragmatism’s anti-foundationalist distrust of metaphysical entities as warrants for certitude”); Galen Strawson, *Scientific Americans: Review of Philip Kitcher, Science, Truth and Democracy*, N.Y. TIMES, Jan. 20, 2002, at 7-12.

circularly, from his choices among possible community identifications, as those communities are modified by stories and anecdotes.¹⁰⁰

Rorty's views on freedom and tolerance not only begin in his communities, but they end there as well. Rorty's suggested political or jurisprudential stance can be characterized, as he suggests, as a form of "postmodernist bourgeois liberalism."¹⁰¹ But if we are interested in any likely effects of Rorty's pragmatism on jurisprudence in general and free speech law in particular, consider not just Rorty's philosophical pragmatism and then, in isolation, his jurisprudence and his free speech law. One must go beyond probing for any narrowly, dryly, logical inconsistencies between the two. Crucially, one must try to imagine the long-term practical effects of a consistent Rortyan philosophical pragmatism on the health of our free speech law. The thinness of philosophical pragmatism may ultimately have unexpected and adverse consequences even for a free speech system designed in accordance with Rortyan political values.

The relationships between philosophical pragmatism and pragmatic law and politics are contested and unclear. Various sorts of positions on their relation have been entertained. For some, "pragmatists are committed to a 'radical democratic' politics."¹⁰² For others, at least, "[a]n anti-foundationalist culture by definition will be different from our foundationalist one."¹⁰³ The majority position seems skeptical of any distinctive implications of philosophical pragmatism for politics and jurisprudence. One writer argues that "pragmatism of the [original or traditional] cognitivist-Peircean variety, does not itself prompt or justify measures

[W]hen Rorty says (so blithely) that only a sentence can be relevant to the truth of another sentence, a sentence like "Millions of human beings were murdered in the 20th century" comes to mind. For what makes this sentence true, and is therefore relevant to its truth, is not other sentences in a web of sentences, but the strictly non-linguistic fact that millions of human beings were murdered in the 20th century.

Id.

100. See *supra* text accompanying note 78. See, e.g., MOUNCE, *supra* note 59 (reacting to Rorty's project); Simon Blackburn, *The Professor of Complacency: Review of Rorty and His Critics*, THE NEW REPUBLIC, Aug. 20, 2001, at 39 (same); John Dunn, *A Postmodernist Mary Poppins: Review of Philosophy and Social Hope*, TIMES HIGHER EDUC. SUPP. 24 (October 6, 2000) (same); Robert Kraut, *Varieties of Pragmatism*, 99 MIND 157, 157 (1990) (noting "[i]t is not always easy to see what Rorty's various formulations amount to, or how the positions designated as 'pragmatist' relate to one another"); Joseph Margolis, *Richard Rorty: Philosophy By Other Means*, 31 METAPHILOSOPHY 529, 529 (2000) (stating "American philosophy is passing through a remarkable deformation championed in its forward direction, as a liberating turn, by Richard Rorty, who is its principal architect and engine"); Carlin Romano, Book Review, *Truth and Progress*, 267 NATION 25 (July 27, 1998); Jay F. Rosenberg, *Raiders of the Lost Distinction: Richard Rorty and the Search for the Last Dichotomy*, 53 PHIL. & PHENOM. RES. 195 (1993).

101. 1 RORTY, *supra* note 61, at 198.

102. Jack Knight & James Johnson, *Political Consequences of Pragmatism*, 24 POL. THEORY 68, 68 (1996).

103. Baker, *supra* note 99, at 712.

sufficient for political equality. Look to liberal democracy's independent commitment to autonomy to secure equality of influence."¹⁰⁴ Another writer holds more broadly that "contrary to the claims of critical theorists, pragmatism yields no privileged perspective from which we can discern the law's alleged complicity in the oppression of the powerless; rather, pragmatism yields relativism about truth and justice."¹⁰⁵

Even more broadly, it has been argued that philosophical pragmatism amounts to "a framework congenial to a wide range of substantive ethical and legal positions."¹⁰⁶ And more colorfully, Professor Jack Balkin has concisely argued that a "legal pragmatist . . . can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else."¹⁰⁷

The writers are thus divided between two sets of views on the consequences for law and politics of philosophical pragmatism. Some link pragmatism to legally and politically progressive trends, but most do not, instead finding philosophical pragmatism to be, perhaps ironically, without any inherent political or legal consequence.¹⁰⁸

However, it is important to see that neither of these views is correct, at least over the long term. This can best be illustrated in connection with the discussion of free speech law below.¹⁰⁹ But the point can be initially clarified by noticing the "flattening" and ultimately trivializing tendencies toward arbitrariness, over the long term, of Rortyan philosophical pragmatism.

A Rortyan pragmatist who abandons metaphysics, truth, and objectivity as aspirations can certainly, for some time, maintain a sort of cultural habit-

104. Judith Baker, *Democratic Deliberations, Equality of Influence, and Pragmatism*, in PRAGMATISM 253, 254 (Cheryl Misak ed., 1999).

105. Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 537 (1993). Rorty, as we have seen, is not a relativist in the sense of believing, say, that it is objectively true that each community's culture or beliefs really are just as good as any others. See *supra* notes 66-68 and accompanying text.

106. Christopher Kutz, *Pragmatism Regained*, 100 MICH. L. REV. 1639, 1644 (2002). See Brian Leiter, Book Note, *Marxism and the Continuing Irrelevance of Normative Theory If You're an Egalitarian, How Come You're So Rich?*, 54 STAN. L. REV. 1129, 1150 (2002) (stating "If high quality moral philosophy does not change the behavior of high quality moral philosophers, why think it is going to affect anyone else? There is, of course, no reason to think anything of the sort."). See also RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 44 (2003) (noting "the suggestion that the pragmatic outlook favors social democracy or legal liberalism is unconvincing. Pragmatism has no political valence"). See *id.* at 45 (referring to the "Darwinian underpinnings of pragmatist philosophy"). See PETER SINGER, TOWARD A DARWINIAN LEFT: POLITICS, EVOLUTION, AND COOPERATION (2000) (discussing a politically left Darwinism).

107. J. M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENT. 351, 351 (1991).

108. See *supra* notes 103-07 and accompanying text.

109. See *infra* Part IV.

based or historically accumulated political momentum. The Rortyan need not feel compelled to abandon any of the vocabulary traditionally associated with even the most profound, or the most deluded, metaphysics. Presumably, the Rortyan will want to deploy the most rhetorically effective moral and legal vocabulary available. The pragmatist can use traditional and still evocative moral language without emphasizing that the language is now being used in an evacuated and non-metaphysical sense.

Nor should it be assumed that a Rortyan pragmatist would be incapable of great rhetorical fervor. Even a young child can be capable of intense emotional expression. Over the long term, the absence of any aspiration to objectivity in the pragmatist framework may actually tend to dampen the fervency of pragmatist rhetoric. There is certainly nothing in the meantime to disqualify the pragmatist from seeking to "diabolize"¹¹⁰—in a presumably non-metaphysical sense of the term "diabolical"—the pragmatist's selected political opponent.¹¹¹

Through re-definition of the key moral and legal terminology, the pragmatist can set aside metaphysics, and the quest for knowledge, truth, or objectivity, and continue superficially to talk as before. In fact, there is really nothing to stop the pragmatist from boldly approaching terms such as "metaphysical," "knowledge," "truth," and "objectivity," and continuing to use these very terms in new, diluted, pragmatist senses. One should question, however, the long-term practical effectiveness of the underlying pragmatist rhetoric. No doubt the pragmatist rejection of traditional metaphysics and the like does not immediately radiate throughout all of one's beliefs, immediately disabling all those emotions, thoughts, and motivations that are logically dependent upon the now abandoned belief in metaphysics. But a sophisticated audience must eventually begin to silently question the real status and persuasive value of the underlying non-objectivist, if impassioned, pragmatist rhetoric.

110. See *supra* note 98.

111. JEAN PORTER, *NATURAL AND DIVINE LAW* 280 (1999). It is useful for pragmatists and non-pragmatists alike to recall that "devotion to a particular, historically embedded, narrative-specific way of life has led to violent persecution of the other at least as often as a commitment to an a-historical moral universalism." *Id.* We may conclude that the pragmatist may certainly seek to increase the political power of like-minded pragmatists, and may well have various reasons for doing so. But the pragmatist cannot be either motivated or constrained by supra-pragmatic considerations, and may well be especially tempted to redefine her pragmatist "commitments" in the face of a need for any substantial genuine personal or group sacrifice. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS* 36-39 (1998) (discussing the background of this theory). See Jean Hampton, *Should Political Philosophy Be Done Without Metaphysics?*, 99 *ETHICS* 791, 807 (1989) (discussing further reluctance to abandon traditional philosophical inquiry in favor of rhetoric and socialization).

B. PRAGMATISM AND LIVED EXPERIENCE

In some cases, the difference between pragmatist rhetoric and traditional metaphysically-oriented rhetoric may seem as clear as the difference between seeing in two dimensions versus seeing in three. Consider the possibility of trying to pragmatize and to metaphysically reduce personal, lived experiences of the Holocaust. Ultimately, to pragmatize the lived experiences and accounts of the Holocaust, however intense the pragmatist's own reactions to the Holocaust undoubtedly are, is akin to losing an entire descriptive dimension.

Let us think of a summary reminiscence of Primo Levi:

They crowd my memory with their faceless presences, and if I could enclose all of the evil of our time in one image, I would choose the image which is familiar to me: an emaciated man, with head dropped and shoulders curved, on whose face and in whose eyes not a trace of a thought is to be seen.¹¹²

If we think of this evil as not merely pragmatically evil, but as somehow also genuinely or objectively evil, are we unjustifiably rejecting pragmatism, or, rather, are we coming closer, though certainly still imperfectly, to seeing things as they are? One should feel reluctant to abandon the latter interpretation. No merely pragmatic interpretation of the Holocaust seems the best we can hope for.

Or consider a moment of Levi's indignation at a fellow inmate: "Can Kuhn fail to realize that next time it will be his turn? Does Kuhn not understand that what has happened today is an abomination, which no propitiatory prayer, no pardon, no expiation by the guilty, which nothing at all in the power of man can ever clean again?"¹¹³ Let us try to reflect on such experiences and reactions. Would it be objectively or even merely

112. PRIMO LEVI, *SURVIVAL IN AUSCHWITZ* 90 (Stuart Woolf trans. 1996) (1958).

113. *Id.* at 130. The "objectivity" and metaphysics of this sort of Holocaust experience thus extends beyond not only Rortyan pragmatics, but also beyond the "common sense" realism and objectivism of some of Rorty's critics. See, e.g., HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 99-101 (2002).

Rorty is right in saying that it makes no sense to think of standing outside of one's thoughts and concepts and comparing "reality as it is in itself" with those thoughts and concepts. How could that idea make sense? What Rorty has done is to move from the unintelligibility of this sort of guarantee to a skepticism about the possibility of representation in a perfectly everyday sense.

Id. Putnam adds, however, without metaphysical elaboration, clarification, or explanation that we can talk about objects in a way that "sometimes gets the facts right." *Id.* at 100 (emphasis in the original). TZVETAN TODOROV, *FACING THE EXTREME: MORAL LIFE IN THE CONCENTRATION CAMPS* 29-30 (Arthur Denner & Abigail Pollack trans. 1996) (regarding Primo Levi on the concentration camps: "'Fundamental values, even if they are not positive, can be deduced from this particular world.' My book. . . is simply an attempt to follow Levi's precept").

pragmatically better if one reduced what Levi is telling us to bare pragmatic dimension? Pragmatism in such a case is an impoverishment.

Or we may think of Elie Wiesel's recounting:

We marched slowly on, as though following a hearse at our own funeral. Four steps more. Three steps. There it was now, right in front of us, the pit and the flames. I gathered all that was left of my strength, so that I could break from the ranks and throw myself upon the barbed wire. In the depths of my heart, I bade farewell to my father, to the whole universe; and in spite of myself, the words formed themselves and issued in a whisper from my lips: *Yitgadal veyitkadach shmø raba . . .* May His name be blessed and magnified . . . My heart was bursting.¹¹⁴

Wiesel has recourse here to metaphor and other figures of speech.¹¹⁵ But pragmatism is not about recognizing the existence of metaphor. We must ask whether, in reducing Wiesel's account of this experience to pragmatically acceptable dimensions, we risk losing more than our arguable metaphysical misunderstanding and illusions. Does one not risk losing the insight that not all experiences, not all reports, and not all discourses are metaphysically flat or metaphysically void?

Consider, finally, an experience of Victor Frankl:

I was roused one night by the groans of a fellow prisoner, who threw himself about in his sleep, obviously having a horrible nightmare. Since I had always been especially sorry for people who suffered from fearful dreams or deliria, I wanted to wake the poor man. Suddenly, I drew back the hand which was ready to

114. ELIE WIESEL, NIGHT 31 (Stella Rodway trans., 1982) (1958). Can the pragmatist better help us adjudicate among, if not discard, the distinctions among delusion, frenzy, vision, prophecy, insight, and apparent "possession?" See *id.* at 23 (describing a woman on a train who is apparently delusional, "continued to scream, breathless, her voice broken by sobs, 'Jews, listen to me! I can see a fire! There are huge flames! It is a furnace!'"'). Or can the pragmatist better accommodate the "conversation" between Wiesel and his father: "For a long time this argument went on. I felt that I was not arguing with him, but with death itself, with the death he had already chosen." *Id.* at 100. Are all conversations pragmatically reducible, with only metaphysical dross and excessive metaphysical ambition lost in the reduction?

We should emphasize that while some examples of metaphysical and objectivist alternatives to pragmatism may have a religious character, there can of course be non-religious metaphysical and objectivist claims. This is certainly one way of interpreting the basic Kantian claim of "reverence" for law—*Achtung vor dem Gesetz*—for the sake of free action from duty. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 19-20 (Lewis White Beck trans. 1959) (1785); THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 36-37 (1992); H. J. PATON, THE CATEGORICAL IMPERATIVE 63-65 (1948). See, e.g., PAUL WOODRUFF, REVERENCE: RENEWING A FORGOTTEN VIRTUE 15, 46, 49, 64-68, 117-18, 124-25, 136 (2001) (validating explicitly non-religious acts of reverence).

115. See generally *supra* note 114.

shake him, frightened at the thing I was about to do. At that moment I became intensely conscious of the fact that no dream, no matter how horrible, could be as bad as the reality of the camp which surrounded us, and to which I was about to recall him.¹¹⁶

Such experiences suggest that ideas of truth and even of knowable truth can sometimes have an objectivity, a groundedness, a confrontedness, a transcendence of any mere group context or group convention, whether pragmatism proposes to ignore such qualities or not.¹¹⁷ These limitations of philosophical pragmatism exist, in less dramatic fashion, whenever important moral and legal values are at stake. This includes the important area of free speech law, as we shall now see. Despite its indeterminacies, Rortyan pragmatism in the long run does not leave free speech law as it found it, but neither does it exert a systematically progressive influence on the law.

IV. FREE SPEECH LAW AND THE PROBLEMS OF PRAGMATISM

A. PRAGMATISM AND THE DEPTH OF THE FREE SPEECH VALUES

The scope and limits of free speech law are central to American constitutional law.¹¹⁸ Admittedly, there is no single approach to free speech law that draws unanimous assent.¹¹⁹ But what is of value in the various mainstream approaches to freedom of speech cannot be entirely reduced to pragmatist dimensions. Pragmatism cannot encompass our best account of the scope and limits of free speech law.

This is not to say that pragmatists must reach some allegedly wrong result in some free speech cases. The problem with Rortyan philosophical pragmatism, apart from its indeterminacies, is not that the method will not give us what we might consider the right outcome in some free speech case.¹²⁰ Rather, the problem is that Rorty's lack of interest in questions of

116. VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 48 (1985) (1946).

117. See *supra* text accompanying notes 103-09.

118. See GEOFFREY STONE, ET AL., *CONSTITUTIONAL LAW* 993-1365 (4th ed., 2001) (devoting 372 pages to freedom of speech, apart from its treatment of freedom of the press, and excluding annual paperback supplement coverage).

119. See, e.g., *Leading Cases: 1. Constitutional Law: 2. Judicial Elections*, 116 HARV. L. REV. 272, 276-80 (2002) (contrasting "functionalist" and "antifunctionalist" approaches to freedom of speech) (discussing *Republican Party v. White*, 536 U.S. 765 (2002)).

120. We shall attempt to sort out only to the degree necessary the pragmatic differences among Rorty's varied formulations of his approach to, say, metaphysics, ranging as they do from apparent dismissal for intellectual implausibility, to suspicion or distrust, to the sense that some or all traditional questions of metaphysics are not practically worth pursuing, or do not matter. See MALACHOWSKI, *supra* note 43, at 43 (discussing the idea of setting aside metaphysics and epistemology, rather than being entrapped within them).

truth, objectivity, and metaphysics impairs his ability to defend or reject free speech claims in their full dimensionality.

Think for a moment about why we might want to give some general constitutional protection to speech. The standard sorts of reasons underlying free speech protection include concern for the values of self-realization,¹²¹ the pursuit of truth,¹²² and democratic self-government.¹²³ Each of these important free speech values can in a limited sense be endorsed by philosophical pragmatism. But pragmatism in free speech law cannot tell all the story we wish to tell.

Begin with the idea of freedom of speech as promoting self-realization. For example, self-realization could in a "thin" sense refer to something like self-gratification, or to being consistently able to control and achieve one's most desired long-range goals, however arbitrarily chosen and of whatever social or objective value.¹²⁴ However, self-realization also refers to the ideas of development, of genuine growth, and of moving from potential to fulfillment in a more objective and metaphysically-laden sense.¹²⁵ In this sense, self-realization may be somehow comparable to blossoming or flourishing, perhaps even in roughly the way that an acorn may develop into a full, healthy oak tree.¹²⁶ The crucial assumption, though, is not one of teleology but of moving from objectively lesser to greater value.

The classic exposition of self-realization as a movement from the objectively less developed to the objectively more developed in the context of free speech is, of course, that of John Stuart Mill.¹²⁷ Mill's discussion of what one might call objective self-realization through free speech is more detailed than can be quickly conveyed, but we can herein cite at least a few representative Millian beliefs.

Mill argues that "freedom of thinking"¹²⁸ is "indispensable to enable average human beings to attain the mental stature which they are capable

121. See *infra* notes 125-36 and accompanying text.

122. See *infra* notes 159-64 and accompanying text.

123. See *infra* notes 165-75 and accompanying text.

124. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593, 602-03 (1982).

125. See, e.g., *id.* at 593, 604; Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-80 (1963). See Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998) (discussing general background). See also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 152-53 (1989) (discussing the "justification for free speech . . . that the government should treat people with dignity and equality. . . . Under this view, suppression represents a kind of contempt for citizens that is objectionable *independent of its consequences*") (emphasis added).

126. See, e.g., T. H. IRWIN, *ARISTOTLE'S FIRST PRINCIPLES* at 94-116 (1988) (discussing Aristotle on teleology, development, and final causation).

127. JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Penguin 1984) (1859).

128. *Id.* at 95.

of.”¹²⁹ Without freedom of discussion, “we cannot hope to find that generally high level of mental activity which has made some periods of history so remarkable.”¹³⁰ In general, “the intellect and judgment of mankind ought to be cultivated”¹³¹ Ultimately, Mill seeks to promote “the highest and most harmonious development of [the person’s] powers to a complete and consistent whole.”¹³² The objective growth and development process generally requires the exercise of a broad range of one’s mental powers.¹³³

It is possible to interpret these, along with any number of other, excerpts from Mill in some sort of merely pragmatist or conventionalist fashion, in which truth rises no higher than the preference, advantage, or consensus of some arbitrarily identified group. Perhaps just about any verbal formulation can be interpreted in pragmatic terms. But it is as an historical matter difficult to believe that Mill intended something like a merely pragmatic understanding of the free speech value of self-realization.

More strongly, it can be said that it is Mill’s aspiration to an objectively greater degree of truth, to genuine progress, and to development beyond mere popular change that accounts for much of the long-standing evocative power and inspiring character of Mill’s essay. One need not deny that Mill appeals to utility¹³⁴ in a broad sense of the term, and to the close

129. *Id.*

130. *Id.* at 96.

131. *Id.* at 97.

132. *Id.* at 121.

133. *Id.* at 123. Classically, the idea of objectively higher and lower degrees of development or functioning, with no particular reference to free speech, is particularly evident in Aristotle. See, e.g., ARISTOTLE, THE NICOMACHEAN ETHICS book ten, 1177a, at 328 (J.A.K. Thomson trans. 1953)(rev. ed. 1976).

If happiness is an activity in accordance with virtue, it is reasonable to assume that it is in accordance with the highest virtue, and this will be the virtue of the best part of us. . . . [C]ontemplation is . . . the highest form of activity (since the intellect is the highest thing in us, and the objects that it apprehends are the highest things that can be known).

Id. See *id.* 1178b, at 330-31.

[i]f the intellect is divine compared with man, the life of the intellect must be divine compared with the life of a human being. And . . . we ought, so far as in us lies, to put on immortality, and do all that we can to live in conformity with the highest that is in us; for . . . in power and preciousness it far excels all the rest.

Id. See also ARISTOTLE, METAPHYSICS book lambda, 1072b, at 260 (Richard Hope trans. 1960) (noting “the activity of mind is also its life, and the divine is that activity. The self-sufficient activity of the divine is life at its eternal best”). These citations are meant only to illustrate possible objective metaphysical understandings of self-realization, not to endorse any such approach over another. Certainly, there can be metaphysics with no recourse to the divine.

134. Mill famously forswears any appeal to the morally right apart from utility, and instead relies on “utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.” MILL, *supra* note 127, at 70.

relationship between truth and utility.¹³⁵ It can even be accepted that an identification of utility with some form of usefulness, and some form of usefulness with the touchstone of philosophical pragmatism. But conceding all this would show only that both Mill and the pragmatist appeal crucially to the criterion of usefulness in one or more senses of the term. It would not show that Mill's understanding of what is useful sets aside the ideals of objectivity and of genuinely greater and lesser truth and self-realization.

Mill's understanding of the free speech value of self-realization allows for, and insists upon, the possibility of aspiring toward identifying objectively higher and lower levels of self-realization, generally, and in the specific context of freedom of speech. Pragmatic approaches to self-realization cannot, by definition, accommodate this distinctive dimension of free speech theory.

This deficiency of pragmatic free speech theory risks what most persons would regard as a serious moral loss. It has been shown¹³⁶ how describing the Holocaust with any modest faithfulness to lived experience requires a framework that transcends pragmatism's lack of interest in the objectively more and less true and the objectively better and worse. An account of the Holocaust in strictly pragmatic terms, even a strongly emotional and vividly descriptive account, that did not somehow borrow the associations, resonances, and overtones of supra-pragmatic accounts would strike most persons as in just this respect ultimately deficient. In many free speech contexts, of course, the differences between pragmatic and supra-pragmatic accounts of what is at stake will not be as striking as in the case of the Holocaust. But the differences, even if less vivid, will be no less real.

To see this, recall not only pragmatism's setting aside any possible objectivity of truth, but pragmatism's indifference to metaphysics,¹³⁷ including the metaphysics of the self that is to be realized through free speech.¹³⁸ If we are not irreducibly and objectively different from, say, inkwells,¹³⁹ and if the self is ultimately just a series of beliefs and desires,¹⁴⁰ the pragmatic self cannot possibly be realized in the sense held open by

135. Mill writes that "[t]he truth of an opinion is part of its utility." *Id.* at 82. "In the opinion, not of bad men, but of the best men, no belief which is contrary to truth can really be useful." *Id.* at 82-83. Mill thus does not say even that the utility of an opinion constitutes its truth, or even part thereof. If a true belief may or may not be useful, truth can hardly be defined in terms of usefulness. And we certainly need not here either endorse or reject Mill's partial linkage of truth and utility. See POSNER, *supra* note 106, at 384 (characterizing Mill as in a sense a "proto-pragmatist").

136. See *supra* notes 113-17 and accompanying text.

137. See *supra* note 59 and accompanying text.

138. See *supra* notes 73-74 and accompanying text.

139. See *supra* text accompanying note 73.

140. See *supra* note 74.

Mill. Even talking inkwells, insofar as they remained inkwells, could not possibly realize themselves, at least in any sense about which we should feel bound to care.

More directly, a de-metaphysicalized self—an organic robot,¹⁴¹ with successive emotions and experiences but certainly lacking any metaphysical freedom of the will¹⁴²—could not realize itself through speech or otherwise, in any sense that matters.¹⁴³ Some organic robots or inkwells, simple or complex, may be more pragmatically useful than others. But organic robots and inkwells do not possess a self that is capable of genuine development or flourishing. Neither do the pragmatic selves that are not ultimately different from complex organic robots or complex inkwells.

One might welcome the abandonment of the metaphysics of the self, of free will, and of genuine moral credit and responsibility if none of this pragmatically mattered or, even better, if as a result morality-dependent forms of cruelty and suffering would be reduced and blaming tempered or eliminated. But as the complex organic robot image suggests, a moral world with metaphysics and the metaphysical self set aside might not be a recognizable moral world at all, let alone a moral world of tolerance toward appropriate persons and the “diabolization”¹⁴⁴ of others. With the reduction of the sorts of cruelty based upon moral blaming or moral desert might well come a gradual loss of meaning in ideas such as dignity, apology, forgiveness, the deepest sorts of love and gratitude, and even of any genuine achievement, as opposed to our merely identifying with certain productive causal chains and events.

141. See, e.g., J. R. LUCAS, RESPONSIBILITY 29-30 (1993) (noting the lack of genuine free will as leaving us with the lives of “mere automata”); GALEN STRAWSON, FREEDOM AND BELIEF 291 n.22 (1986) (raising the “organic robot” analysis for entities not presumed to be capable of genuinely free will or in this sense genuine moral agency); PETER VAN INWAGEN, METAPHYSICS 203-08 (2d ed., 2002) (finding morality as self-evidently an illusion if there is no free will, and no one can consistently reject free will in their own actual subjective experience).

142. See ROBERT KANE, THE SIGNIFICANCE OF FREE WILL (1996) (attempting to defend the meaningfulness and the reality of freedom of will); TIMOTHY W. O’CONNOR, PERSONS AND CAUSES: THE METAPHYSICS OF FREE WILL (2000) (same). See SAUL SMILANSKY, FREE WILL AND ILLUSION (2000) (discussing the possible consequences of any genuine and consistent abandonment of traditional metaphysical doctrines of free will, genuine moral agency, and genuine moral responsibility). Richard H. Fallon, *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 892-93 (1994) (citing PETER F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 7-14 (1974)) (arguing that abandoning free will and autonomy in the relevant sense would make little practical difference). See also DERK PEREBOOM, LIVING WITHOUT FREE WILL 187-213 (2001) (arguing for some likely gains and losses to ordinary life under such assumptions) (citing TED HONDERICH, A THEORY OF DETERMINISM 513-19 (1988)).

143. This is not to deny that an organic robot could be programmed to repair itself and even enhance some of its functions by internal feedback. Presumably, though, this does not exhaust what Mill means by self-realization.

144. See *supra* note 97. In a literal sense, of course, one cannot “diabolize” anyone without adopting metaphysical assumptions and beliefs.

If one were to genuinely take ourselves to be only metaphysically minimal selves, there is every risk that most current non-pragmatists, and indeed some current pragmatists, would not care for the eventual result. The consistent abandonment of free will and of all moral responsibility—deserved credit as well as genuinely deserved blame—and the familiar, if mysterious, metaphysical self might well strike us, with our current progressive values, as debilitating,¹⁴⁵ terrifying,¹⁴⁶ a degrading of the quality and depth of human relationships,¹⁴⁷ and as involving a great loss of value,¹⁴⁸ with a flattening, a hollowness, and an increasing manipulateness in human relations.¹⁴⁹

This is not to suggest that a world without familiar metaphysics, even of the self, would be a cold, morose place, perpetually embarrassed and acutely conscious of what it has gained and lost. There could, after all, in all logic be neither genuine pride nor genuine embarrassment in such a place. Perhaps hooking up to Robert Nozick's extremely gratifying virtual reality "experience" machines would eventually be a popular permanent choice.¹⁵⁰ We could eventually genetically design ourselves to find increased entertainment in all sorts of low-cost events. But however popular such options might eventually be in a de-metaphysicalized society, the pragmatist can hardly expect to appeal to current progressive attitudes with such a prospect.

None of this suggests that the value of self-realization is always best served by judicially finding in favor of the speaker and against the party seeking to restrict the speech at issue. Some instances of speech can be aimed not so much at anyone's enlightenment as at intimidation and bare discouragement. One way of thinking about hate speech is to ask whether the free speech value of self-realization in such a case actually lies more

145. Donald L. M. Baxter, *Free Choice*, 67 AUSTRALASIAN J. PHIL. 12, 17 (1989).

146. Paul Benson, Book Review of Richard Double, *The Non-Reality of Free Will*, 101 MIND 364, 367 (1992).

147. Susan Wolf, *The Importance of Free Will*, 90 MIND 386, 395 (1981).

148. Randolph Clarke, *Free Will and the Conditions of Moral Responsibility*, 66 PHIL. STUD. 53, 55 (1992). See also ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 291 (1981).

149. Without the metaphysics to support "dignity," there can at most be the social relationship to support "price." See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 102 (Mary Gregor trans. 1998) (1785); ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 143 (1999).

150. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 42-45 (1974). See also Robert Young, *The Value of Autonomy*, 32 PHIL. Q. 35, 38-39 (1982). See MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 37-39 (1998) (discussing the theory that emphasizing gratification in a de-metaphysicalized culture is an extreme example of the broader problem of why a pragmatist should endure significant uncompensated avoidable sacrifices for the sake of whatever values the pragmatist has opted to embrace).

with the unwilling targets of verbal abuse than with the speakers.¹⁵¹ To the extent that it does, a free speech theorist would have a reason based in the value of self-realization to restrict the speech in question.

Let us conclude that the free speech value of self-realization, as we ordinarily understand this value, cannot prudently be entrusted to pragmatist care. Ultimately, the consistent pragmatist can accommodate, at most, only a limited version of self-realization. Bracketing truth, objectivity, and the metaphysical may well pay off in terms of usefulness on some occasions. But in setting aside the goals of truth, objectivity, and metaphysics in the context of self-realization, the pragmatist hurts more than helps and ironically fails William James's own usefulness-oriented test for truth.¹⁵²

To be sure, the value of self-realization is only the first of the values thought to crucially underlie freedom of speech. The free speech values of the pursuit of truth¹⁵³ and of democratic self-government¹⁵⁴ are arguably also important. Truth, particularly the aspiration to the ideal of objective truth, is famously important to Mill's defense of freedom of speech.¹⁵⁵ The pursuit of truth as a free speech value has been judicially endorsed¹⁵⁶ and has attracted a range of critical commentary.¹⁵⁷

151. Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865 (1998); Wojciech Sadurski, *Offending With Impunity*, 14 SYDNEY L. REV. 163 (1992). In this context, it is useful to remember the Supreme Court plurality's observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978). Something of this logic may underlie the court's approval of the criminalization of public cross-burnings intended to intimidate. *Virginia v. Black*, 538 U.S. 343 (2003).

152. See *supra* text accompanying notes 44-48.

153. See *supra* text at note 122.

154. See *supra* text at note 123.

155. See, e.g., MILL, *supra* note 127, at 78.

[I]t is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals . . . every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages.

Id. With respect to a free speech pragmatism of usefulness, Mill observes that "[t]he usefulness of an opinion is itself matter [sic] of opinion . . . as disputable, as open to discussion, and requiring discussion as much as the opinion itself." *Id.* at 82. Determination of free speech cases on any sort of pragmatic ground is indeed likely to be surprisingly complex. See *infra* text accompanying notes 176-90. Again, we should point out that there is, technically, no way to prove that Mill or anyone else was not a pragmatist, as virtually any claim can be given some sort of a pragmatist interpretation, or in some sense endorsed by a pragmatist.

156. At least the idea of political truth in particular is central to Justice Brandeis' classic concurrence in *Whitney v. California*. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating "[t]hose who won our independence believed . . . that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth"). See also *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (referring to Justice Brandeis' classic concurrence "speech that is 'indispensable to the discovery and spread of

But one need not separately discuss the deficiencies of philosophical pragmatism in accounting for truth as a free speech value. It is nearly impossible to separate the pragmatist's setting aside of any objectivity of truth from the pragmatist's limited account of self-realization as a free speech value.¹⁵⁸ Whether we think of truth as a goal in describing the Holocaust experience,¹⁵⁹ or of truth, as variously understood and assessed,¹⁶⁰ as a free speech value, there is little here to add beyond our discussion of the self-realization value. The discussion of pragmatism and truth as a free speech value would be not merely analogous to our discussion of the self-realization value, but structurally the same.

This is not to suggest that anyone who endorses a pursuit-of-truth approach to free speech must be committed to the reality, or even the possibility, of objective truth, or to anyone's ability to actually recognize objective truth.¹⁶¹ And it is certainly possible for pragmatists to adopt truth as a free speech value while denying that truth is ever objective. A pragmatist can certainly argue that in some cases free speech will promote truth in the sense of usefulness to a given community, or truth in the sense of whatever some community somehow already assents to.¹⁶²

What the pragmatist account of the truth value cannot encompass, again, would be truth in the sense in which the above Holocaust accounts¹⁶³ aspire to be most deeply and valuably true. In contrast, the quest for the

political truth"" as "that form of speech which the Framers of the Bill of Rights were most anxious to protect") (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

157. See, e.g., Greenawalt, *supra* note 125, at 130-31 (discussing defenses and critiques of truth as a free speech value); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 703 (1987) (stating "freedom to believe false ideas should be respected, not because beliefs cannot be known to be false, nor because false beliefs are valuable in themselves, but rather because the freedom to believe false ideas is a necessary condition for the possibility of genuine, voluntary belief in true ideas"); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 4 (1995) (stating "[t]he value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) (stating "the hope that the marketplace leads to truth, or even to the best or most desirable decision, becomes implausible" partly because "truth is not objective"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1243-44 and n.211 (1983) (discussing Professor Baker's theory in this respect and linking Baker's approach to Rortyan pragmatism).

158. See *supra* notes 125-53 and accompanying text.

159. See *supra* notes 113-17 and accompanying text.

160. See *supra* notes 125-53 and accompanying text.

161. Marshall, *supra* note 157, at 4.

162. See, e.g., *supra* text accompanying notes 83-102 (citing examples of the sorts of non-metaphysical, not-purportedly-objectively-true beliefs Rorty wishes to assert in community).

163. See *supra* notes 113-17 and accompanying text.

objective general or particular truth of the Holocaust can in principle make progress, or can regress, and can recognize some of what pragmatism must miss.

The third free speech value, democratic self-government, may initially seem to present a crucially different case. Surely, one might suppose, the value of democratic self-government is reducible without residue to merely pragmatic values. Surely the pragmatist can say everything that anyone would reasonably want to say about democratic self-government. One can at least imagine a democratic pragmatist counting votes without worrying whether metaphysical freedom of the will underlies the votes cast.

This is indeed largely, but not entirely, right. The contemporary pragmatist's interest in democracy can be just as prominent as anyone else's.¹⁶⁴ And the practices of counting ballots and assigning each ballot a certain weight¹⁶⁵ seem merely cultural or even mechanical rather than metaphysical. Much of the logic of democratic self-governance¹⁶⁶ can, indeed, be expressed in pragmatic terms.

But again, there may be some things we want to say about our deepest understanding of the value of democratic self-government that can be said at most only superficially within the limits of pragmatism.¹⁶⁷ Consider the

164. See, e.g., 1 RORTY, *supra* note 61, at 175. See also RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH CENTURY AMERICA* (1999). See Richard J. Bernstein, *One Step Forward, Two Steps Back: Richard Rorty on Liberal Democracy and Philosophy*, 15 POL. THEORY 538 (1987) (commenting on Rorty's book); Richard Rorty, *Thugs and Theorists*, 15 POL. THEORY 564 (1987) (responding to Bernstein's article). See JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1977) (1916) (discussing the classical theory); Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671 (1990) (discussing the contemporary theory).

165. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983) (judicial skepticism of any quantifiable departure from equality of individual vote strength).

166. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (discussing the democratic self-governance value as underlying freedom of speech); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANING OF AMERICA* (1999) (same); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) (noting "[a]lthough some view the First Amendment as a protection of the individual interest in self-expression, a far more plausible theory . . . views the First Amendment as a protection of popular sovereignty"); Greenawalt, *supra* note 125, at 145-46 (stating "the application of a principle of freedom of speech to political affairs is centrally important"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 547.

167. And in a roughly parallel way, this could be true as well of discussions of tolerance, and why tolerance should in particular cases be valued. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); JOHN LOCKE, *AN ESSAY CONCERNING TOLERANCE* 31 (James H. Tully ed., 1983) (1689) (noting "the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God") (metaphysically laden, if in the extreme, and substantively fallacious). Compare this argument with the observations of Richard Rorty discussed *supra* in text accompanying notes 87-90 (tolerance and the limits of tolerance presumably without metaphysics). See JEREMY WALDRON, *LOCKE, TOLERATION AND THE RATIONALITY OF PERSECUTION IN JOHN LOCKE: A*

approach taken to democratic self-government in general and to proportional representation in particular by Professor Lani Guinier. Professor Guinier argues that, "[b]lack cannot enjoy equal dignity . . . until black representatives join the council of government."¹⁶⁸ She defines a vision of "civic inclusion"¹⁶⁹ partly in terms of "equal political dignity."¹⁷⁰ Professor Guinier's normative argument frequently refers to the idea of dignity in various contexts.¹⁷¹

Certainly, reference to the idea of dignity in various electoral contexts does not commit one to metaphysics of any serious sort.¹⁷² Electoral indignity can refer merely to a system that involves more systematic inequalities than the speaker prefers. But the idea of dignity inevitably draws meaning and strength from, and has often been deployed within, some metaphysical, supra-pragmatic context.¹⁷³ Most naturally imagine a powerful normative theory of dignity and equality in the context of voting rights, free speech, or any other constitutional context as having a significant metaphysical dimension.¹⁷⁴ It is of course this metaphysical dimension, of whatever sort

LETTER CONCERNING TOLERATION 98 (Susan Mendus & John Horton eds., 1991) (criticizing commentary on Locke's approach to tolerance). See generally TOLERATION: AN ELUSIVE VIRTUE (David Heyd ed., 1996) (discussing broadly the nature, logic, and limits of toleration). See also HERBERT MARCUSE, REPRESSIVE TOLERANCE IN A CRITIQUE OF PURE TOLERANCE 110 (Robert P. Wolff, Barrington Moore, Jr., & Herbert Marcuse 1965).

168. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 34 (1994) (reprinting Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 421 (1989)).

169. *Id.* at 34 (quoting Pamela Karlan, *Maps and Misreadings: Going Beyond Single-Member Districts in Section 2 Cases*, 24 HARV. C.R.-C.L. L. REV. 173 (1989)).

170. *Id.*

171. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1431 (1991) (stating "[d]ignity as participants in the political sphere[.]" "the dignity of minorities"). She also refers to dignity as "offense to black voters' dignity." *Id.* at 1431 n.65. Two more examples are referring to the value of "equal political dignity" and "dignity . . . to the strongly held sentiments of minorities[.]" *Id.* at 1480.

172. GUINIER, *supra* note 168, at 109. Professor Guinier indicates that "[b]y extending my speculative reconstruction of political equality to legislative deliberations, I am not . . . articulating a grand moral theory of politics." *Id.* Putnam, *supra* note 164, at 1696 (describing Deweyan democracy as aspirationally seeking "a society that develops the capacities of all its men and women to think for themselves, to participate in the design and testing of social policies, and to judge the results"). Putnam's account here seems to leave open the question of whether developing one capacity rather than another can be objectively better or worse.

173. GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN (A. Robert Caponigri trans. 1956) (1486).

174. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776). Note that while the Declaration contains religious references, metaphysics of course need not and cannot be confined to religion or to religious metaphysics. *Id.* In the free speech context, we can, for example, imagine a secular metaphysics of freedom that might underlie John Stuart Mill's approach to free speech. The courts often refer to the idea of dignity in ways that may be read as trans-pragmatic and certainly not religious. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 755, 763 (1983) (Brennan and Marshall, JJ., dissenting) (stating "today's ruling denigrates the values of individual autonomy and dignity central to many constitutional rights"); *Cohen v. California*, 403 U.S. 15, 24 (1971)

and however developed, that is crucially unavailable to the pragmatist account of democratic self-government as a free speech value.

B. PRAGMATISM AND FREE SPEECH: INDETERMINACY, ZOMBIE VIOLENCE, AND THE LIVED NIGHTMARE

The very popularity of pragmatist approaches to philosophy, law, and to free speech in particular has led to, or resulted from, an expansion of the meanings of "pragmatism." In its most important contemporary philosophical sense, pragmatism is, of course, associated with distrust or rejection of metaphysics, knowledge, aspiration to, objectivity of truth and such, for the sake of some sort of payoff.¹⁷⁵ But some courts¹⁷⁶ and contemporary legal writers wish to use the term "pragmatism" to refer merely to their non-dogmatic, case-by-case, pluralistic, contextualized, payoff-conscious, anti-formalistic, "commonsensical" approach to legal issues.¹⁷⁷ Pragmatism in this limited sense is just as concerned as Rortyan philosophical pragmatism¹⁷⁸ with outcomes or payoffs, but is less interested in philosophical reform and controversy.

Oddly, pragmatism of all sorts seems incapable of persuasively reaching determinate judicial outcomes in free speech and other cases any more readily than non-pragmatist approaches. This is not to suggest that the scope of the indeterminacy problems faced by non-pragmatist judges is less substantial than that faced by pragmatist judges.¹⁷⁹ It is ironic, though,

(referring to the "premise of individual dignity and choice upon which our political system rests" within the free speech context).

175. See *supra* text accompanying notes 59-79

176. In the free speech context, see, e.g., the references to the value of pragmatism in a contextualized, case-by-case, less overtly theory-laden sense in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442 (1957) (quoting Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951)); *Kramer v. Thompson*, 947 F.2d 666, 673 (3d Cir. 1991) (citing *Kingsley Books*, 354 U.S. at 441-42).

177. Among the leading contemporary legal theorists of pragmatism in this less strictly philosophically-oriented sense would be writers such as Daniel Farber. See *infra* sources cited note 182. See also Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 595-96 (1999) (endorsing a contextualized, institutionally internal, participatory sort of pragmatism).

178. Of course, one could endorse much, if not all, of Rortyan philosophical pragmatism while also adopting pragmatism in the less philosophical sense. See, e.g., Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347, 352-53 (2000) (endorsing "a stronger eye for context and detail" as well as the more philosophical belief that "'reality' . . . was actually a creature of social interpretation and construction"). Wells also argues that "pragmatism relieves us of the need for metaphysical justification" as distinct from the need to "examine our hearts to determine who we are and what is the perceived significance of the activity in question[.]" *Id.* at 354.

179. See, e.g., Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339 (1996) (discussing the recurring problems of indeterminacy in judicial decision-making

that pragmatic approaches to case adjudication, conscientiously applied, are not especially pragmatic in the sense of readily generating one judicial outcome rather than another. It is difficult to see why pragmatism should be especially credited with reaching desirable judicial payoffs if it is difficult even for the pragmatist to conscientiously settle upon one case outcome to the exclusion of another.¹⁸⁰

One can simultaneously emphasize only so many pragmatically relevant considerations. Assume, for example, that a pragmatist judge, in either the philosophical or the narrower, less philosophical sense, adjudicates with more careful attention to circumstances and to particularized context¹⁸¹ than does a non-pragmatic judge. It is certainly good in the abstract to be sensitive to circumstance. But it is also possible that focusing on circumstance might lead a pragmatist judge to pay somewhat less attention to broad principle or to systematic and inherent biases in the law.

This leaves the pragmatist judge with an inescapable question: how much weight, generally or in a given case, should a pragmatist judge give to narrow case context and circumstance on the one hand, and how much weight to broader systemic or structural biases on the other? It will not do for the pragmatist judge to simply decide this methodological question itself on a case-by-case basis. The pragmatist judge would have to show why this methodological decision itself can safely be made on a case-by-case basis, without accounting for any broad systematic biases that might skew just this sort of methodological case-by-case decision-making.

Again, the point is not that non-pragmatic judges by comparison reach satisfactory judicial outcomes by unimpeachable methods and with little difficulty. That would be false. The point is instead that the greater the indeterminacy in pragmatic judicial decision-making, the less likely it is

generally); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

180. As one leading contemporary pragmatist has written, "[o]nce one is freed from the demands of global theory, . . . it is not quite clear what happens next." Wells, *supra* note 178, at 358. It is possible to argue that if we give up on even our best, most eclectic and inclusive global or deep theories of free speech law, we will become either more strongly committed to free speech, or more strongly committed to free speech in just the kinds of cases where we should be. It is difficult, however, to see why our commitment to free speech would be enhanced if we were unanimously content with purely pragmatic understandings of free speech and free speech values. Giving up on metaphysics, the idea of objective truth, and such, hardly seems to especially invite sacrifices for the sake of freedom of speech or, for that matter, sacrifices of speech for the sake of values such as equality or personal dignity. While we may not agree on the best single "metaphysical" defense of free speech, we may not agree on the best "pragmatic" account of any given free speech case, or even on the pragmatically best case outcome. And it is hard to see why disagreement about metaphysics must undermine free speech more than disagreement about pragmatics.

181. See *supra* text at note 178. The case of *Virginia v. Black*, at several points seeks to emphasize contextual differences among public cross-burnings. See generally *Virginia v. Black*, 538 U.S. 343 (2003).

that pragmatic judicial decision-making will consistently have any sort of unique practical payoff.

And this is just the beginning of the important indeterminacies the pragmatist judge must face. Consider some further dimensions of indeterminacy: a pragmatist judge in the philosophical sense must distrust or avoid metaphysics, any aspirations to objectivity, or perhaps any sort of grand theory.¹⁸² But how, if at all, should such a pragmatist judge address grand theory? Should a pragmatist judge ever refer to pragmatism? What is the pragmatic value of transparency or even of simple candor in judicial decision-making? Doesn't distrust of grand theory or of metaphysics come in degrees? What is the proper degree of such distrust according to the pragmatist judge? Should the pragmatist judge avoid familiar metaphysics and the like entirely? Can metaphysics in the law just be straightforwardly judicially minimized? Is "deep" metaphysics usually worse than "shallow" metaphysics? Is religious metaphysics worse than non-religious metaphysics? But what if the choice is between politically progressive "deep" metaphysics and less politically progressive "shallow" metaphysics? Should pragmatism as a judicial method always be trumped by politics?¹⁸³ To what extent should the pragmatist judge avoid (otherwise) methodologically proper decisions that may give direct or indirect "aid and comfort" to the judge's own political antagonists?

The pragmatic judge must then confront the question of how to trade off the value of a decision that is pragmatically right on its own terms with the value of such a decision over time, as a stronger or weaker precedent, and as a properly or improperly understood decision.¹⁸⁴ Is it usually worse for a pragmatic judicial decision to be misunderstood politically or misunderstood methodologically? On what might this depend? Should a

182. See, e.g., *supra* text at notes 61-102 (discussing Richard Rorty's pragmatism); Wells, *supra* note 178, at 352-54; Daniel A. Farber & Philip A. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1615-17 (1987) (pragmatism or practical reason opposed to "grand theory," "unified theory," or "foundationalism"); *id.* at 1635, 1637 ("situation sense"); *id.* at 1637-40 (foundationalism opposed to "a web of mutually reinforcing values"); *id.* at 1646-47 ("skepticism of rigid dichotomies," "tolerance for ambiguity," "contextual justification," and "overall humility"); Farber, *supra* note 2, at 164-69 (to similar effect). See also Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). Robin West links pragmatism with an emphasis on experience, induction, empiricism, and a critical focus on need. Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

183. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 16 (1997) (generally subordinating an eclectic methodology that distrusts objectivity and truth to pre-existing political commitments).

184. See DAVID H. HODGSON, *CONSEQUENCES OF UTILITARIANISM* 50-62 (1967) (discussing the context of various sorts of utilitarian theories with varying levels of acceptance and compliance).

pragmatic judge ever attempt to consider forms of likely resistance to or the likely overextension or abuse of the judicial decision? The pragmatic judge may be inclined to take as many such practical considerations into account as possible. But at some point this inclination becomes unpragmatic and goes beyond judicial heroism into hubris.¹⁸⁵ What few, simple rules might guide the pragmatic judge better than all the above complex inquiries?

The indeterminacies multiply: if the pragmatic judge is to consider any sort of practical consequence, what time frame is to be encompassed, and who are the persons or entities for whom consequences are to count?¹⁸⁶ To what extent do non-members of the community, the distant future, or nature itself pragmatically count?¹⁸⁷ To what extent do any non-pragmatist values or even anti-pragmatic values actually held by legislators, agencies, other judges, or the litigants themselves count? Should the pragmatist judge respect non-pragmatist values only to the degree that they can be translated into pragmatist values, even if this undercuts the popular credibility of the pragmatist judge's decision? Should the pragmatist judge's first loyalties be to those groups with whom the judge most identifies?¹⁸⁸ But what if these first loyalties in turn counsel a broad pattern of social concern,¹⁸⁹ perhaps broader than the general public is as yet psychologically prepared to accept? Pragmatism by itself does not tell us what role various sorts of education of the public should play in different sorts of adjudication.

The point is that however we conceive of pragmatism in the law, we cannot intelligently evaluate any form of such pragmatism based on the appeal of its broad self-description, its explicit emphases, and its general goals. Most of the real interest in any form of pragmatism in the law must lie in its very particularized formulation and detailed practical application.

185. Recall that Dworkin's judicial Hercules is "a lawyer of superhuman skill, learning, patience, and acumen." Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975). A pragmatist judge must recognize that trying to absorb too many practical considerations, beyond a certain point, will itself become counterproductive and in this basic sense self-defeatingly unpragmatic.

186. Compare, for example, the controversial moral claims asserted on behalf of some non-human animals by PETER SINGER, *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* (Tom Regan & Peter Singer eds., 2d ed. 1989). More broadly, the pragmatic emphasis on contextualism must somehow be clarified. Professor Steven D. Smith has observed that "[p]ragmatism would . . . be useful if it could provide guidance about how to select the proper context for controversial issues; but on that question, unfortunately, pragmatists offer little help." Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 435 (1990). See also *id.* at 448 (stating "[t]he remedy, if there is one, for the failures of recent theorizing lies not in a pragmatic flight from theory, but rather in better and more courageous theorizing").

187. See, e.g., DANIEL A. FARBER, *ECO-PRAGMATISM* (1999); see also Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 HARV. L. REV. 1421 (2000) (reviewing Farber's work).

188. See *supra* notes 88-91 (citing some of Rorty's primary adopted loyalties).

189. See *supra* notes 83-87.

Consider the judicial pragmatism of Richard Posner, which overlaps with, but is in some respects distinct from, Rorty's philosophical pragmatism. Posner's judicial pragmatism seeks to somehow avoid moral philosophy¹⁹⁰ and moral theory¹⁹¹ as useless¹⁹² to adjudication and even to legal doctrine.¹⁹³ Instead, Judge Posner advocates attention to case precedent, clear legal text, social science and policy, common sense, intuition, public opinion, and "immersion in the facts."¹⁹⁴ With regard to constitutional issues in particular, Judge Posner emphasizes attention to social context, causes, costs, and consequences.¹⁹⁵ All of this is in some sense informed by the desire "to maximize the social utility of the law."¹⁹⁶ The latter goal we shall temporarily assume to be merely a matter of intuition or perhaps "common sense,"¹⁹⁷ and not at all a matter of moral theory or philosophy.¹⁹⁸

190. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* viii (1999).

191. *Id.* at ix.

192. *Id.* at viii-ix.

193. *Id.* at viii.

194. *Id.*

195. *Id.* at x.

196. *Id.* at xi.

197. *Id.* at viii.

198. *Id.* at viii-ix. Posner is in some respects herein influenced by Justice Holmes. *See, e.g., id.* at viii n.1 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881)). *See also id.* at 11 (discussing Nazi Germany in a way suggestive of Holmesian metaethics). *See* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991 (1997) (1897) (discussing the question of Holmesian pragmatism); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 465 n.41 (1994) (discussing conflicting views of any linkage between Holmes' views and pragmatism, along with some textual evidence). *See also* Albert W. Alschuler, *Law Without Values: Holmes' Path of the Law One Hundred Years Later*, 46 FLA. L. REV. 353, 357 n.16 (1997) (stating "because Holmes was indifferent to the flourishing or happiness of all members of society, he should not be regarded as a pragmatist"). *See* Mathias Reimann, *Horrible Holmes*, 100 MICH. L. REV. 1676 (2002) (responding to Alschuler's article). *See* BENJAMIN N. CARDOZO, *SELECTED WRITINGS* 149 (Hall ed., 1947) (discussing the broader influence of generalized pragmatism in American jurisprudence). Cardozo states, "the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition." *Id.* (quoted in *Gertz v. Welch*, 418 U.S. 323, 403 (1974) (White, J., dissenting)). *But see* *Welsh v. United States*, 398 U.S. 333, 342-43 (1970) (conscientious objector exemption case) (contrasting "moral, ethical, or religious principle" with "considerations of policy, pragmatism, or expediency"); *Ehlert v. United States*, 402 U.S. 99, 108, 112 (1971) (Black, J., dissenting) (linking one sense of pragmatism to considerations of policy or expediency).

Elsewhere, Judge Posner has emphasized the impossibility or the uninterestingness of pursuing the foundations of knowledge, truth, and objectivity as the sort of pragmatism in which he is interested. In this, Judge Posner follows the lead of Richard Rorty. *See* Rosenfeld, *supra* note 77, at 110-34 (discussing some similarities and differences between Posner's and Rorty's versions of pragmatism). Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002). Posner elaborates in this fashion:

The test for knowledge should not be whether it puts us in touch with an ultimate reality . . . but whether it is useful in helping us to achieve our ends. The human mind developed not to build a pipeline to the truth but to cope with the physical environment in which human beings evolved, and so a proposition should be tested

Given the breadth and indeed the largely common sense character of Judge Posner's methodology, there is certainly nothing to prevent the Posnerian judicial pragmatist from reaching any sensible result in any free speech case. One must ask, though, whether Posner's pragmatism yields a determinate free speech case result more often than would a sensible non-pragmatic, theory-laden approach to free speech. Ultimately, we must also determine whether Posnerian pragmatism in free speech cases must indirectly rely on the sort of moral theory Posner wishes to avoid.

Let us take, as a representative example of Judge Posner's recent free speech jurisprudence, the violent video game ordinance case of *American Amusement Machine Association v. Kendrick*.¹⁹⁹ *Kendrick* involved a successful free speech challenge to an Indianapolis ordinance restricting

not by its correspondence with "reality" but by the consequences of believing or disbelieving it.

Id. Consequences under consideration are to include systemic as well as immediate consequences.
Id.

Under such pragmatism, the question of why we should choose one set of ends rather than another looms especially large. And it is still difficult to accept that whether we should believe, in one fashion or another, the Holocaust accounts reported above depends upon whether such belief would help us to achieve our non-metaphysically tainted chosen ends. Certainly, believing these accounts may happen to offer some sufficient payoff in terms of some selected non-metaphysical ends. But even if the consequences of such beliefs were ultimately disturbing or subversive of some of our ends, we would still face a choice. We might choose to admit such accounts, and change our non-metaphysical ends to accommodate the truth of such accounts.

More simply, there is Professor Jed Rubenfeld's response to Posner in this regard:

Posner's "pragmatist" thinks we should believe that dropped objects will fall toward the earth because it is useful to believe it Posner's "pragmatist" will have a hard time explaining why it is so useful to believe that dropped objects will fall toward the earth. He will miss the clearest reason why: namely, because dropped objects do fall toward the earth—because, in other words, the proposition is true.

Jed Rubenfeld, *A Reply to Posner*, 54 STAN. L. REV. 753, 764-65 (2002). Actually, it is not difficult, within the confines of pragmatism, to explain the usefulness of this sort of belief. One possibility is that such a belief tends to contribute to the believer's hypothetical project of enhancing his or her genetic fitness. See COLIN MCGINN, *ETHICS, EVIL, AND FICTION* 50 (1997) (discussing false beliefs of this sort, as opposed to false moral beliefs, as typically naturally self-punishing). However, such explanations invite questions as to the value and status of one's chosen ends. There seems a certain arbitrariness in non-philosophically preferring one public policy over another, even in the rare case in which the winners and losers would be the same under either public policy.

See Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1735 (1998) (discussing and critiquing Posnerian pragmatism, addressing in particular Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998)); Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 687 (1999) (arguing nonetheless, although in some sense a pragmatist himself, that "Posner's discussion sometimes seems oddly oblivious to notions of human dignity"); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597, 600-01 (2000) (distinguishing between questions of improvement along some measure and questions of distribution and fairness); John Mikhail, *Law, Science and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1080-81 (2002) (discussing Posner's pragmatism); Peter Berkowitz, *Reduction and Betrayal*, THE NEW REPUBLIC, Aug. 23, 1999, at 38.

199. 244 F.3d 572 (7th Cir. 2001) *cert. denied*, 535 U.S. 994 (2001).

minors' unaccompanied access to arcade video machines featuring defined sorts of "graphic violence."²⁰⁰ Judge Posner sought, and did not find, "compelling and not merely plausible"²⁰¹ grounds for believing that the video games in question caused sufficient harm to either the players themselves or to the public at large to justify the speech restrictions.²⁰²

Judge Posner's account of the ordinance's unconstitutionality was broad-based and could conceivably draw upon each of the pragmatic considerations Posner cites as a pragmatic theorist.²⁰³ At its broadest, Posner's argument is that in Kendrick:

The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him . . . the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.²⁰⁴

Judge Posner's conclusions have proven persuasive.²⁰⁵ It is certainly possible for a sensible pragmatist to reach an opposite result, on various

200. *Kendrick*, 244 F.3d at 573. Indianapolis' best known free speech case is *American Booksellers Ass'n v. Hudnut*. 771 F.2d 323 (7th Cir. 1985) *aff'd mem.*, 475 U.S. 1001 (1986).

201. *Kendrick*, 244 F.3d at 576.

202. *Id.* at 576-77.

203. See *supra* notes 190-98 and accompanying text.

204. *Kendrick*, 244 F.3d at 577 (emphasis in the original). There follow references to graphic violence in, *inter alia*, HOMER, THE ODYSSEY; DANTE ALIGHIERI, THE DIVINE COMEDY; LEO TOLSTOY, WAR AND PEACE; MARY SHELLEY, FRANKENSTEIN. See WILLIAM SHAKESPEARE, THE HISTORY OF KING LEAR, act 3, sc. 7 (depicting the interaction between Gloucester and Cornwall). Actually, it seems only partially, and not entirely, accurate to characterize parental objections to violent video game play by minors as a desire to suppress access to disfavored ideas, in a way that would narrow the child's intellectual universe. One could certainly wish for a minor to thoroughly understand the nature and roles of violence in the world without also wishing for the minor to spend substantial amounts of time in violent (or any other sort of) video game play. More generally, violent video game play may involve intellectual opportunity costs.

205. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (noting "most federal courts to consider the issue have found video games to be constitutionally protected"); *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002) (citing *Kendrick*, 244 F.3d at 572); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). See Michael T. Morley, "Exceedingly Vexed and Difficult": Games

pragmatic grounds. Doubtless, it is impossible, beyond some level of rigor, to causally link graphically violent video game use in public by unsupervised minors with any judicially cognizable social harm. Reasonable pragmatists could, however, suspect that it will virtually never be possible to rigorously prove that such a narrowly described cultural phenomenon, and not some other factor or set of factors, causally underlies any general social harm. Common sense suggests it is practically impossible to sort out any effects of the relatively few regulated violent video games from the effects of the mass of unregulated such games, violent movies, violent television scenes, and other sorts of violent imagery in a violence-suffused media culture. The chances of an otherwise conscientious and informed future citizen growing up with an insufficient awareness of violence, or of any other social idea or phenomenon, because of the ordinance in question seem limited.

A pragmatist might, applying a different sort of intuition, "common sense," or public opinion,²⁰⁶ conclude instead that unsupervised youthful virtual "amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or . . . [disfigurement]"²⁰⁷ actually provide no unique and irreplaceable element of effective citizenship or bulwark against the rise of Nazism or any other totalitarian movement.²⁰⁸ Common sense is unsurprised by the apparent fact that the military actually uses violent video games to train soldiers.²⁰⁹ Common sense sees the abhorred SS mentality as itself distinctively and not coincidentally violence-oriented and sadistic. Common sense might equally suppose that blankness of mind²¹⁰ and being "raised in an intellectual bubble"²¹¹ have very little to do with the presence or absence of the ordinance in question. The main purpose and effect of such an ordinance, given widespread alternative access to violent imagery, might in fact be symbolic.²¹² But the pragmatist need not object either to

and the First Amendment, 112 YALE L.J. 361, 366-68 (2002) (discussing the expressive communication issue).

206. See *supra* text accompanying note 195.

207. *Kendrick*, 244 F.3d at 573 (quoting the ordinance).

208. *Id.* at 577.

209. See *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1137 (E.D. Mo. 2002) *rev'd remanded by*, 329 F.3d 954 (8th Cir. 2003).

210. See *Kendrick*, 244 F.3d at 577.

211. *Id.*

212. See Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 940-45 (1997). We should be reluctant to assume that symbolic government acts are pointless acts or that they are even symbolically ineffective and ultimately inconsequential. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 172 (1964). Edelman argues "mass publics respond to currently conspicuous political symbols: not to 'facts,' and not to moral codes embedded in the character or soul," furthermore "[p]olitics can therefore become a residual supplier of the symbols that [persons] require." *Id.* at 184.

benign symbolism in general nor to any of the benign symbolic purposes conceivably underlying the Indianapolis ordinance at issue.

None of this is to suggest that Judge Posner's disposition of the ordinance case was in fact wrong in pragmatic terms. Rather, the point is that a conscientious pragmatist could reasonably conclude, for example, that the ordinance's literally tokenistic impediments to youthful public virtual dismemberment of or by zombies²¹³ do not impair free speech interests in such a way as to outweigh whatever symbolic value the ordinance may have. Therefore, one may presume that there is some sensible but less thoroughly "pragmatic" approach to free speech that can address this case in a way no less determinate than can judicial pragmatism.

Of course, indeterminacy is one thing, and ultimate satisfactoriness is another. Whether Judge Posner reached the right judicial result in *Kendrick* or not, pragmatist approaches to *Kendrick* and to free speech cases more generally must be compared in their ultimate satisfactoriness with the best available supra-pragmatist accounts. On this score, we must not grant any advantage to the latter merely because they are metaphysically more ambitious. But it should also be permissible to judge some more metaphysical account of the scope and limits of free speech law to be a richer, deeper, and more satisfactory account of free speech law than any pragmatic alternative. It is certainly far from clear that *Kendrick* represents, in context, our best accommodation of the free speech values of the pursuit of truth, democracy, and self-realization.

As we have seen indirectly in connection with Holocaust accounts and directly in connection with the values underlying free speech, the satisfactoriness of an approach to free speech must, all else equal, depend on that approach's openness to the possibility of an encounter—sometimes a confrontation—with metaphysical depth, truth, and objectivity.²¹⁴ Judge Posner's free speech theory, however, cannot go any deeper than is allowed by his consciously avoiding metaphysical commitments. Certainly, the free speech pragmatist judge can speak with any borrowed vocabulary and at any level of vehemence. Crucial, though, is how deep or shallow an account of the free speech values of self-realization, truth, and even democracy judicial pragmatism can allow. Our examination above of the potential depth, richness, and meaningfulness of non-pragmatic accounts of these free speech values, and the relative thinness of pragmatic accounts of these values, leaves little grounds for optimism.

213. *Kendrick*, 244 F.3d at 577.

214. See *supra* Part IV.A.

Posnerian free speech pragmatism thus leaves much to be desired. Certainly as Judge Posner indicates in *Kendrick* in particular,²¹⁵ there can be pragmatic intra-conversational, intra-cultural, non-metaphysical appeals against Nazism. Judge Posner argues that the trial of the Nazi leaders "was right not because it could produce proof that the Nazis *really* were immoralists; they were, but according to our lights, not theirs."²¹⁶ But, this sort of pragmatic approach does not begin to accommodate all of the most significant dimensions of the Holocaust experience.²¹⁷ Not everything about the Holocaust can be reduced to a culturally optional conversation, a selected cultural identification, one's own inescapable situatedness, and a distaste for metaphysics. Some experiences transcend such grounds and limitations. They would, as lived nightmares, retain their actual moral character even if all our conversations and cultural identifications permanently changed in such a way as to ignore or downplay the Holocaust.

Let us conclude merely by briefly revisiting the objective, culturally transcendent nightmare of the Holocaust. In particular, let us consider what Primo Levi referred to as the "deliberate creation of pain that was an end in itself."²¹⁸ Levi asks:

What else was the purpose of emptying out nursing homes filled with elderly sick people already near death and hauling them off to

215. See *supra* note 205 and accompanying text.

216. POSNER, *supra* note 190, at 11 (emphasis in the original). In this, Posner follows Holmes's general lead. Holmes wrote to Harold Laski of German military tactics during World War I in these terms:

I often think of the way our side shrieked during the late war at various things done by the Germans such as the use of gas. We said gentlemen don't do such things—to which the Germans: "Who the hell are you? *We* do them." There was no superior tribunal to decide—so logically the Germans stood as well as we did.

Letter from Holmes to Laski of April 18, 1930, in HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 1238 (Mark DeWolfe Howe ed., 1953) (emphasis in the original). Holmes is, presumably, not making the narrowly legal point that international law did not or could not adjudicate as between the American and German views. See Heidi Margaret Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1429-30 (1988) (discussing Homesian pragmatism and moral relativism). See Catharine Pierce Wells, *Reinventing Holmes: The Hidden Life of a Cynical, Ambitious, Detached and Fascistic Old Judge Without Values*, 37 TULSA L. REV. 801 (2002) (reviewing ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000)) (discussing a more sympathetic account of Holmes from a particular pragmatist perspective). This is not to suggest that there are sets of concepts and categories, or language of any sort, that fully and adequately depict and convey the lived nightmare of the Holocaust. Whether a pragmatist might wish to claim otherwise, to the credit or discredit of pragmatism, is unclear. See POSNER, *supra* note 106, at 379 (discussing a possible legal distinction between generally targeted protest marches by American neo-Nazis and more personally targeted neo-Nazi abuse).

217. See *supra* notes 113-17 and accompanying text.

218. Cynthia Ozick, *Review of Primo Levi, The Drowned and the Saved*, THE NEW REPUBLIC, March 21, 1988, at 32-36.

Auschwitz to be gassed? Or forcing grown men to lap up soup like dogs by depriving them of spoons (of which there were tens of thousands at Auschwitz)? Or using human ash from the crematoria to make "gravel" paths for the SS villagers that ruled the camp? Or selling human hair to the German textile industry for mattress ticking? Or locking human beings into decompression chambers to establish at what altitude human blood begins to boil: a datum that can be obtained in any laboratory at minimum expense and without victims . . . ? ²¹⁹

Here, in this form of inflicting pain and humiliation for its own sake, was a practice that both pragmatists and non-pragmatist of course want, each in their own way, to condemn. One is ultimately left to choose between an intra-cultural, intra-conversational, pragmatic condemnation, and a condemnation that would remain valid even if one lost his or her way, and even if values and identifications were changed and we took evil for good. In a similar, though obviously less dramatic way, we cannot say all that we want to say about the values underlying free speech and the limits of free speech if we rest content with pragmatism.

219. *Id.* It is reported that at the Auschwitz crematoria, "[t]here were wooden benches along the walls, and above these benches there were pegs and coat hangers The pegs were numbered and the signs told the prisoners to remember their numbers so that they could retrieve their clothes after the baths." OTTO FRIEDRICH, *THE KINGDOM OF AUSCHWITZ* 68 (1994) (1982).
